LEADING CONSTITUTIONAL DECISIONS

By

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PREFACE

Those who are engaged in the study of American national government or American constitutional history ought to become familiar with the way in which the Supreme Court of the United States does its work, and with some of the great decisions of that tribunal which have served as landmarks in the development of the American constitutional system It has been to meet the needs of such students that this book has been written In the preparation of such a volume as this the problem of selection is, of course, difficult No two editors would be likely to agree as to just which cases should be incorporated The forty-three cases printed here include a considerable number of the decisions of great historic interest and also a selection of those having current interest as throwing light upon the present-day problems with which the Supreme Court is dealing It was in order to make possible the inclusion of these later cases that certain famous decisions which no longer state the law (Chisholm v. Georgia, The Dred Scott Case, The Income Tax Cases, etc) have been reluctantly omitted. The cases printed might be classified in many different ways. The arrangement here adopted is designed to follow roughly the plan commonly used in college courses in American government.

The Supreme Court does not do its work in a vacuum. Its decisions upon important constitutional questions can be understood in their full significance only when viewed against the background of history, politics, economics, and personality surrounding them and out of which they grew. It is the purpose of the brief introductory notes to reconstruct this background, to suggest the significance of the cases in our constitutional development, and, to a limited extent, to indicate the relation of the decisions printed to other, perhaps equally important decisions which could not be included.

The need for compression has made the inclusion of annotations impossible. The editor is, therefore, unable to make detailed acknowledgments of many sources from which material for the various notes has been drawn. He has, however, made free use of Mr. Charles Warren's invaluable work, "The Supreme Court in United States History," as well as Mr Beveridge's scholarly and delight-

ful "Life of John Marshall" He wishes to make grateful acknowledgment to Professor Arthur N. Holcombe of Harvard University, who has read the manuscript and made many helpful suggestions, and also to Professor Thomas Reed Powell of the Harvard Law School, who read the notes in proof and greatly improved them by criticism and correction.

ROBERT E. CUSHMAN.

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I. AMENDMENTS TO THE CONSTITUTION

HAWKE v. SMITH

253 U. S 221, 64 L. Ed 871, 40 Sup. Ct. 495. 1920.

The Eighteenth, or Prohibition Amendment was proposed by a joint resolution of Congress, December 3, 1917, which stipulated that it should be inoperative unless ratified by the legislatures of three-fourths of the states within seven years from that date A system of direct legislation applicable to statutes and amendments to the state constitution has been in force in Ohio since 1912. In November, 1918, a popularly initiated amendment to the Ohio constitution was ratified by a large majority of the voters; this provided "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the Constitution of the United States" On January 7, 1919, the Ohio legislature ratified the Eighteenth Amendment and on January 27 the governor formally notified the Secretary of State in Washington of this action. Two days later the Secretary of State proclaimed the Eighteenth Amendment duly ratified by three-fourths of the states, Ohio being included in the list. In spite of this, however, a petition, under the alleged authority of the Ohio constitutional amendment of November, 1918, was filed with the secretary of state of Ohio, calling for a popular referendum upon the resolution of ratification

At this juncture Hawke, a citizen of Ohio, brought what is commonly known as a taxpayer's action, asking the court to enjoin Smith, the secretary of state of Ohio, from spending the state's money for the purpose of holding the proposed referendum election, and alleging that the state's power of referendum could not constitutionally be applied to the ratification by the state legislature of a federal amendment. The supreme court of Ohio decided that the referendum was legitimate and the case was appealed to the Supreme Court of the United States.

The decision of the court was awaited with great interest While Ohio was the only state in which a referendum upon the ratification of a federal amendment was specifically provided for by constitutional provision, more than twenty state constitutions provide for the referendum upon acts of the legislature in general, and in nine states besides Ohio the question had arisen whether the people could, by popular vote, overrule the action of their general assemblies in ratifying an amendment to the United States Constitution.

A question of interest which was not passed upon by the court in this case is whether the ratification of a federal amendment in due form can be withdrawn or reversed by later action. New Jersey, Ohio, and Oregon sought to withdraw their ratifications of the Fourteenth Amendment in 1868. The Secretary of State, acting upon the instruction of Congress embodied in a concurrent resolution, counted the ratifications binding and proclaimed the amendment in force. New York tried to withdraw her ratification of the Fifteenth Amendment Tennessee rescinded her ratification of the Nineteenth Amendment in 1919 on the ground that the legislature had exceeded its power in ratifying since the state constitution stipulated that a legislative election must intervene between the proposal of an amendment by Congress and its ratification by the state legislature, and this had not been observed by the Tennessee legislature In none of these cases was the withdrawal of ratification recognized as binding by the Secretary of State in Washington The better view seems to be that a ratification is irrevocable, but that rejection of an amendment is to be regarded merely as an emphatic failure to ratify and may be overruled by a subsequent action.

In Dillon v. Gloss, 256 U. S 368 (1921), the court said that it could be fairly inferred from the amending clause of the Constitution (article 5) "that the ratification must be within some reasonable time after the proposal" and held that the Eighteenth Amendment was not unconstitutionally adopted by virtue of the fact that Congress in submitting it to the states stipulated that it should be inoperative unless ratified within seven years

In Leser v. Garnett, 258 U. S. 130 (1922), it was urged upon the court that there were implied limitations upon the power to amend the federal Constitution and that the Nineteenth Amendment (Woman Suffrage) was void because of its subject-matter since "so great an addition to the electorate, if made without the state's consent, destroys its autonomy as a political body." This argument was rejected by the court, which pointed out that the Nineteenth Amendment was similar in form to the Fifteenth, which has been recognized as valid for fifty years

Mr Justice Day delivered the opinion of the court, saying in part

. . The question for our consideration is: Whether the provision of the Ohio constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the general assembly of proposed amendments to the federal Constitution, is in conflict with article 5 of the Constitution of the United States. . .

The fifth article is a grant of authority by the people to Con-

gress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution, that power is conferred upon Congress, and is limited to two methods by action of the legislatures of three-fourths of the states, or conventions in a like number of states. Dodge v Woolsey, 18 Howard 331 The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification, by this method all of them have been adopted

The only question really for determination is· What did the framers of the Constitution mean in requiring ratification by "legislatures"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of electors of Congressmen as "those requisite for electors of the most numerous branch of the state legislature." Article 1, section 3, provided that Senators shall be chosen in each state by the legislature thereof, and this was the method of choosing Senators until the adoption of the Seventeenth Amendment, which made provision for the election of Senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment In article 4 the United States is required to protect every state against domestic

violence upon application of the legislature, or of the executive when the legislature cannot be convened. Article 6 requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By article 1, section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be. Article 4, section 3, provides that no new states shall be carved out of old states without the consent of the legislatures of the states concerned

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose The members of the House of Representatives were required to be chosen by the people of the several states Article 1, section 2

The constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a general assembly consisting of a senate and house of representatives. Article 2, section 1, provides:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided "

The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this,—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment Hollingsworth v. Virginia, 3 Dallas 378. In that case it was con-

tended that the amendment had not been proposed in the manner provided in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval, in accordance with article 1, section 7, of the Constitution The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said: "There can surely be no necessity to answer that argument The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution" The court by a unanimous judgment held that the amendment was constitutionally adopted

It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

This view of the provision for amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of federal amendments The choice of means of ratification was wisely withheld from conflicting action in the several states

But it is said this view runs counter to the decision of this court in Ohio ex rel. Davis v. Hildebrant, 241 U S 565 But that case is inapposite. It dealt with article 1, section 4, of the Constitution, which provides that the times, places, and manners of holding elections for Senators and Representatives in each state shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated It was held, affirming the judgment of the supreme court of Ohio, that the referendum provision of the state constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. Article 1, section 4, plainly gives

authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

It follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion

Reversed.

II. PRINCIPLES OF THE FEDERAL SYSTEM —NATIONAL SUPREMACY, ETC.

McCULLOCH v. MARYLAND

4 Wheaton (U S.) 316, 4 L Ed 579. 1819.

When Congress in 1791 chartered the First Bank of the United States, it was only after a most full and bitter argument as to whether it had the power to do so Hamilton, who had proposed the creation of the bank, had written an elaborate opinion defending it as an exercise of a power reasonably implied from those expressly delegated to Congress Jefferson and his friends had stoutly maintained that congressional powers must be strictly construed and that the granting of the charter was an act of unwarrantable usurpation Nevertheless the charter of the first bank was never attacked in the courts as being unconstitutional, and the institution continued to exist until its charter expired in 1811 The financial conditions ensuing after the War of 1812 made the re-establishment of the bank desirable, and the Second Bank of the United States was accordingly chartered in 1816. Almost immediately it incurred the bitter odium of large sections of the country, especially of the west and south The bank was largely under the control of the Federalists, who were accused of using it as a political machine and of wielding its great influence for political purposes, its stock was largely held by British capitalists and other foreign investors; and it was accused of being responsible for a period of financial depression which brought ruin to thousands It is true that the bank had begun operations under corrupt and inefficient management and had encouraged a high degree of inflation of credits. This had resulted in heavy losses to investors, in the state of Maryland the Baltimore branch collapsed with a loss to Maryland investors alone of a sum variously estimated from $1,700,000 to $3,000,000. Wiser counsels prevailed shortly, however, and the bank faced about and embarked upon a financial course as conservative as it had hitherto been headlong. It refused to accept the bank notes of the imprudent state banks and insisted upon the liquidation of its credits One after another these over-inflated state banks failed, and hundreds of reckless speculators were ruined Money was almost unobtainable While most of this financial disaster was the inevitable result of the orgies of inflation and speculation in which the frontier communities in particular had been indulging, the Bank of the

United States was popularly regarded as the cause of disaster, as the ruthless "money trust" which was ruining the prosperity of the country. A popular demand for legislative control of the bank was set up, and eight states passed either laws or constitutional amendments restricting the activities of the bank or imposing heavy burdens upon it. The law involved in this case, passed by the legislature of Maryland, which was particularly hostile to the bank because of its earlier debacle, is typical of this legislative onslaught

The Maryland statute forbade all banks not chartered by the state itself to issue bank notes save upon special stamped paper obtainable upon the payment of a very heavy tax This requirement could be commuted by the payment of an annual tax to the state of $15,000 A penalty of $500 forfeiture was inflicted for each offense, an amount which in the case of the now large and prosperous Baltimore branch of the Bank of the United States would have come possibly to millions of dollars McCulloch, the cashier of the branch in Baltimore, issued notes without complying with the state law and this action was brought on behalf of the state of Maryland to recover the penalties

The case was argued for nine days before the Supreme Court by the greatest lawyers of the day; William Pinkney, Daniel Webster, and William Wirt defended the Bank, while Luther Martin, Joseph Hopkinson, and Walter Jones represented the state of Maryland. The opinion of Marshall in the case is commonly regarded as his greatest state paper.

The announcement of the decision was the signal for a veritable storm of abuse directed against the Supreme Court. Judge Roane, of the Virginia court of appeals, published a series of newspaper attacks upon the decision so bitter that Marshall was led to write a reply in his defense The Virginia legislature passed a resolution urging that the Supreme Court be shorn of its power to pass upon cases to which states were parties. Ohio, which had previously passed a law taxing each branch of the Bank of the United States within its limits $50,000 a year, defied the Supreme Court and proceeded to collect the tax in spite of its decision, a position from which it was later obliged to withdraw, Osborn v The Bank of the United States, 9 Wheaton 738 (1824). It is interesting in the light of current criticism of the court from certain quarters that the attack upon the court in this case was directed in large part against the failure of that tribunal to invalidate an act of Congress (incorporating the bank) and not against the exercise of the judicial veto The decision was peculiarly odious to the strict constructionists because it not only sustained the doctrine of the implied powers of Congress but also recognized the binding effect of an implied limitation upon the states preventing them from interfering with the functioning of federal agencies.

The doctrine of implied powers in Congress is not new in this case Not only had it been ably expounded by Hamilton as above mentioned,

but in the case of United States v. Fisher, 2 Cranch 358 (1805), which had been decided fourteen years before, Marshall himself had given expression to the doctrine; but as that case did not relate to any such important political issues as did the bank case, the decision at that time had evoked no comment.

Mr Chief Justice Marshall delivered the opinion of the court, saying in part:

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given, which may essentially influence the great operations of the government No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank? . . .

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the

supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect that it would be this. that the government of the Union, though limited in its powers, is supreme within its sphere of action This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all, it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the constitution or laws of any state, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will

admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation In considering this question, then, we must never forget, that it is a constitution we are expounding

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money, to regulate commerce, to declare and conduct war, and to raise and support armies and navies The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means Throughout this vast republic, from the St Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and ex-

pensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey, but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

. . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of affecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning.

To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect, but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? . . . That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable Such is the character of human language, that no word conveys to the mind, in all situ-

ations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary To no mind would the same idea be conveyed, by these several phrases . This word, then, like others, is used in various senses, and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view

Let this be done in the case under consideration The subject is the execution of those great powers on which the welfare of a nation essentially depends It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in

proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1 The clause is placed among the powers of Congress, not among the limitations on those powers.

2 Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc, "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be

suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. . .

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. . . .

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire·

2 Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a

similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports, the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme, that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . .

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion, and is no longer to be considered as questionable

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign

power of every other description, is trusted to the discretion of those who use it . .

The argument on the part of the State of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it . . .

That the power to tax involves the power to destroy, that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the state

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument They may tax the mail, they may tax the

mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process, they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people They did not design to make their government dependent on the states . . .

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government

But the two cases are not on the same reason The people of all the states have created the general government, and have conferred upon it the general power of taxation The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents, and these taxes must be uniform But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the

legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JOHNSON v. MARYLAND

254 U S. 51, 65 L Ed. 126, 41 Sup. Ct. 16. 1920.

While the general rule established in McCulloch v. Maryland is clear enough that the states may not interfere with or burden the agencies and instrumentalities of the federal government, it is not always easy to be sure just what, in a concrete case, constitutes interference or burden In the present case, however, the rule would seem clearly to apply If the license required of the driver of the mail truck is regarded as a means of revenue to the state, it is clearly a tax on the federal postal system; if it is a means whereby the state sets up and enforces qualifications of admission into the business of driving a mail truck, it is equally an interference with the management of the postal system

The case leaves unsettled a more difficult question; namely, could the driver of the mail truck in this case be properly punished by the state or municipal authorities for violating the local traffic regulations with regard to speed and so forth, passed for the purpose of protecting the safety of the community? The answer to this question would depend first upon whether Congress had enacted or authorized any regulations of its own in conflict with those of the community If it had, such regulations would prevail against any local attempt to supersede them. But in the absence of any federal regulations it would seem that the federal employee ought to be held amenable to such local police regulations as may be reasonably necessary for the protection of life and limb, provided they do not extend to actual interference with the normal and efficient operation of the federal service The question resolves itself into one of degree, in which the need for local protection would be balanced against the extent to which the federal agency would be em-

barrassed or interfered with. In an interesting old case in the United States circuit court in 1817, United States v. Hart, 1 Peters (C C.) 390, one of the high constables of Philadelphia was held not guilty of a breach of the federal statute forbidding the obstruction of the mails when he had stopped a stage "going very rapidly through Market Street, some of the witnesses supposed it to be at a rate of eight or nine miles an hour" The act of Congress was so construed as to allow the local authorities to interfere with such reckless driving

Mr. Justice Holmes delivered the opinion of the court, saying in part

The plaintiff in error was an employee of the Postoffice Department of the United States, and, while driving a government motor truck in the transportation of mail over a post road from Mt Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted, and fined for so driving without having obtained a license from the state. He saved his constitutional rights by motion to quash, by special pleas, which were overruled upon demurrer, and by motion in arrest of judgment. The facts were admitted, and the naked question is whether the state has power to require such an employee to obtain a license by submitting to an examination concerning his competence and paying $3, before performing his official duty in obedience to superior command.

The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest, and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheaton 316 The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheaton 429, 430); and that is the law to-day. . . A little later the scope of the proposition as then understood was indicated in Osborn v Bank of the United States, 9 Wheaton 738, 867. "Can a contractor for supplying a military post with provisions be restrained from making purchases

within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarin, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not "subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal authority" Ohio v Thomas, 173 U. S. 276, 283 It seems to us that the foregoing decisions establish the law governing this case

Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment That was decided long ago by Mr Justice Washington in United States v. Hart, Peters (C C.) 390. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment,—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. . . This might stand on much the same footing as liability under the common law of a state to a person injured by the driver's negligence But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States, acting under and in pursuance of the laws of the United States. . .

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct, it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the department to employ persons competent for their work, and that duty it must be presumed has been performed. . . .

Judgment reversed

Mr Justice Pitney and Mr. Justice McReynolds dissent.

IN RE NEAGLE

135 U. S. 1, 34 L. Ed. 55, 10 Sup Ct. 658. 1890.

State interference with federal activities or agents may arise not only in the exercise of the state's power of taxation or police regulation, but also in the normal administration of justice in the state courts. In Tarble's Case, 13 Wallace 397 (1872), a state judge sought by issuance of a writ of habeas corpus to release from military service in the United States army an enlisted boy alleged to be under military age. The Supreme Court of the United States emphatically denied the right of the state court to interfere thus with the administration of federal military affairs, or decide questions of federal military law.

To prevent United States officers acting under federal revenue laws from being held accountable to state authorities Congress at an early date provided by statute that in case any civil or criminal action be brought against a revenue officer in the state courts such a case could be removed into a federal court for trial. In Tennessee v. Davis, 100 U S 257 (1880), a federal revenue officer was indicted for murder in a state court for having killed a man, in self-defense as he claimed, in the discharge of his duty The Supreme Court sustained the validity of the act and allowed the case to be removed for trial to the federal district court

In the Neagle case, which arose out of a very extraordinary set of circumstances, the doctrine of federal supremacy was pushed even further Mr Justice Field, of the United States Supreme Court, under the judicial system then prevailing held circuit court on the Pacific coast In a case tried in San Francisco he had ruled against a client represented by a lawyer named Terry, who had earlier been chief justice of the supreme court of California, and Terry had made a physical assault upon Judge Field in the courtroom. For this he was imprisoned for six months for contempt of court and upon his release made open threats against Judge Field's life The matter being laid before the Attorney General, Neagle, a United States deputy marshal, was detailed to travel with Judge Field and protect him from violence Terry, following up his threat, made a second murderous attack upon the judge in a railroad restaurant where the judge had stopped while traveling on circuit duty, and was about to draw his revolver when Neagle shot and killed him. Neagle was promptly arrested by the local authorities and indicted for murder. He was released upon a writ of habeas corpus by the federal circuit court on the ground that he was held in custody for "an act done in pursuance of a law of the United States," within the meaning of the federal statute providing for the issuance of the writ in such cases.

The most significant feature of the case is that the "law of the United States" in pursuance of which Neagle acted was not an act of Congress, but merely an executive order issued by authority of the President In sustaining Neagle's release the court holds that the President in the exercise of the duty imposed upon him to see that the laws are faithfully executed may without special statutory authority appoint an officer to protect the life of a federal judge.

Mr Justice Miller delivered the opinion of the court, saying in part:

. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the state authorities for this offense, unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the circuit courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defense of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves . .

We have no doubt that Mr. Justice Field when attacked by

Terry was engaged in the discharge of his duties as circuit justice of the ninth circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States"

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from

the malice and hatred of those upon whom their judgments may operate unfavorably. . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government They are appointed by the President, with the advice and consent of the Senate They are removable from office at his pleasure They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress

If we turn to the executive department of the government, we find a very different condition of affairs The Constitution, section 3, article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies He is declared to be commander-in-chief of the army and navy of the United States The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called,

and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection The correspondence already recited in this opinion between the marshal of the northern district of California, and the Attorney General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provision which he did make, for the protection and defense of Mr Justice Field

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof"

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States. . . .

That there is a peace of the United States, that a man assaulting

a judge of the United States while in the discharge of his duties violates that peace, that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California, are questions too clear to need argument to prove them That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violater of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States. . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him, that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim, that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the circuit court authoriz-

ing his discharge from the custody of the sheriff of San Joaquin County.

Mr. Justice Lamar delivered a dissenting opinion in which Mr. Chief Justice Fuller concurred.

TEXAS v. WHITE

7 Wallace 700, 19 L Ed. 227 1869

It may be said that the vital question whether one of the states of the Union may constitutionally secede was effectively and permanently answered upon the battlefields of the Civil War Four years after the war had ended, however, the Supreme Court found itself under the necessity of deciding whether the southern states had at any time during the period of attempted secession been actually out of the Union Was secession, in point of law, constitutionally possible?

In 1850 the United States gave the state of Texas $10,000,000 in 5% bonds in settlement of certain boundary claims Half of these were held in Washington, half were delivered to the state and made payable to the state or bearer, and redeemable after December 31, 1864. A Texas law was passed providing that the bonds should not be available in the hands of any holder until after their endorsement by the governor Texas joined the Confederacy at the outbreak of the war, and in 1862 the state legislature repealed the act requiring the endorsement of the bonds by the governor and created a military board to provide for the expenses of the war, empowering the board to use any bonds in the state treasury for this purpose up to one million dollars. In 1865 this board made a contract with White and others for the transfer of some of the bonds for military supplies. None of the bonds was endorsed by the governor of the state. Immediately upon the close of the war, but while the state was still "unreconstructed" or unrestored to its former normal status as a member of the Union, suit was brought by the governor of the state to get the bonds back and to enjoin White and the other defendants from receiving payment of them from the federal government The suit was brought by Texas in the Supreme Court of the United States as an original action, and at the very threshold of the case arose the question whether Texas, after her efforts at secession, was still a "state" within the meaning of the third article of the Constitution extending the original jurisdiction of the Supreme Court to those cases "in which a State shall be party." Texas at this time was still unrepresented in Congress and the radical republicans like Stevens claimed that she was out of the Union

Mr. Chief Justice Chase delivered the opinion of the court, saying in part:

. . It is not to be questioned that this court has original jurisdiction of suits by states against citizens of other states, or that the states entitled to invoke this jurisdiction must be states of the Union But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such states

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it . .

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable During the whole of that war there was no governor, or judge, or any other state officer in Texas, who recognized the national authority. Nor was any officer of the United States permitted to exercise any authority whatever under the national government within the limits of the state, except under the immediate protection of the national military forces

Did Texas, in consequence of these acts, cease to be a state? Or, if not, did the state cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a state to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States

The union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual" And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more

perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the states. Under the Articles of Confederation, each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people And we have already had occasion to remark at this term, that "the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the states in union, there could be no such political body as the United States" Not only therefore can there be no loss of separate and independent autonomy to the states, through their union and under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all of its provisions, looks to an indestructible union, composed of indestructible states.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the state. The act which consummated her admission into the Union was something more than a compact, it was the incorporation of a new member into the political body And it was final. The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. There was no place for reconsideration, or revocation, except through revolution, or through consent of the states.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of

the state, as a member of the Union, and of every citizen of the state, as a citizen of the United States, remained perfect and unimpaired It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union. If this were otherwise, the state must have become foreign, and her citizens foreigners The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation

Our conclusion therefore is, that Texas continued to be a state, and a state of the Union, notwithstanding the transactions to which we have referred And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the national government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a state, of the right to sue in this court, there needs to be a state government, competent to represent the state in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the state, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought And the same must necessarily be true of the obligations and relations of states and citizens to the Union No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the state as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the state, refusing to recognize their constitutional obligations, assumed the charac-

ter of enemies, and incurred the consequences of rebellion. [Here follows an account of the actual governmental status of Texas during the Civil War and the subsequent period of reconstruction.]

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . .

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

Mr. Justice Grier dissented from the decision of the court, saying in part.

. . . Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction This court is bound to know and notice the public history of the nation

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. . . .

THE SLAUGHTERHOUSE CASES

16 Wallace 36, 21 L. Ed. 394 1873.

At the close of the Civil War it seemed clear that without the intervention of the federal government the southern states would by legislative restrictions strip the newly freed negro of most of the ordinary rights and immunities of free citizens. To meet this situation the Fourteenth Amendment was proposed by Congress not only for the primary purpose of placing the civil rights of the negro upon a firm basis but also of coercing the southern states into allowing the negro to vote by the threat of reduced representation in Congress By the first section of the amendment United States citizenship was defined in terms which included the negro, and the states were forbidden to make laws abridging the privileges and immunities of that citizenship or denying due process of law or the equal protection of the laws. Congress was empowered to enforce these prohibitions by legislation.

There seems no doubt that as a matter of historical fact the framers of the amendment meant by "privileges or immunities" of citizens of the United States" the whole body of ordinary civil rights and especially those enumerated in the bill of rights of the federal Constitution They intended to place in the hands of Congress the broadest possible power

to prevent the impairment of these rights, and they thought they had done so. Instead of looking to the state legislature for legislative protection of his civil liberty, the citizen, especially the freedman, would henceforth look to Congress or to the federal courts. A veritable revolution would thus be wrought in the previous equilibrium of state and national power.

The Slaughterhouse Cases, the first cases involving the interpretation of the Fourteenth Amendment, had nothing whatever to do with the rights of freedmen The case arose on the following facts· The reconstruction, or "carpet-bag" government in Louisiana, unquestionably under corrupt influence, had granted a monopoly of the slaughterhouse business to a single concern, thus preventing over one thousand other persons and firms from continuing in that business The validity of the law was attacked under the Fourteenth Amendment. The case was argued before the Supreme Court twice and was decided by a majority of five to four

The importance of the case can hardly be overestimated. By distinguishing between state citizenship and national citizenship, and by emphasizing that the rights and privileges of federal citizenship did not include the protection of ordinary civil rights, such as freedom of speech and press, religion, the right of assembly, etc., but only the privileges which one enjoyed by virtue of his federal citizenship, the court averted the revolution in our constitutional system intended by the framers of the amendment, and reserved to the states the control of civil rights generally. In a later case, Maxwell v. Dow, 176 U. S 581 (1900), the court specifically ruled that the privileges and immunities of citizens of the United States do not include the rights contained in the first eight amendments to the federal Constitution

Had the Slaughterhouse Cases been decided twenty-five years later, the Louisiana statute would in all probability have been invalidated as a deprivation of liberty and property without due process of law and a denial of the equal protection of the laws. But the majority of the court disposed rather summarily of these clauses by holding in substance that the due process of law clause was not a limitation on the state's police power, and that the equal protection of the laws clause, equally inapplicable, would probably never be invoked except for the protection of the negro. How poor a prophet Mr. Justice Miller proved to be is indicated by the fact that by 1911 (see Collins, the Fourteenth Amendment and the States) the Supreme Court had handed down 604 opinions under the Fourteenth Amendment of which only 28 had involved the rights of negroes as such; indeed, there have been more cases interpreting the Fourteenth Amendment than on any other phase of constitutional law.

Mr. Justice Miller delivered the opinion of the court, in part.

. . . The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States,

That it denies to the plaintiffs the equal protection of the laws, and,

That it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of amendment

This court is thus called upon for the first time to give construction to these articles. . .

Twelve articles of amendment were added to the federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original, and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . . Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt. [Here follows a brief comment upon the Thirteenth Amendment.]

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided al-

ways in the District of Columbia or in the territories, though within the United States, were not citizens Whether this proposition was sound or not had never been judicially decided But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside "

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States

The next observation is more important in view of the arguments of counsel in the present case It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider, but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States

in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase . .

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Four-

teenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposition of the plaintiffs in error be sound For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects And still further, such a construction followed by the reversal of the judgments of the supreme court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions, when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people, the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as

such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its national character, its Constitution, or its laws

One of these is well described in the case of Crandall v Nevada, 6 Wallace 35 (1868) It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several states ". . .

Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state One of these privileges is conferred by the very article under consideration It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error,

if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the federal power It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the states in this matter in the hands of the federal government.

We are not without judicial interpretation, therefore, both state and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws "

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment Con-

gress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment. . . .

The judgments of the supreme court of Louisiana in these cases are affirmed.

Mr Justice Field, with whom concurred Mr. Chief Justice Chase, Mr Justice Swayne, and Mr. Justice Bradley, rendered a dissenting opinion, as did the two latter justices also.

III. CIVIL AND POLITICAL RIGHTS—FEDERAL AND STATE

BARRON v BALTIMORE

7 Peters 243, 8 L. Ed 672 1833

One of the bitter criticisms urged against our federal Constitution as it came from the hands of the Convention was that it contained no bill of rights. It was feared that without specific guarantees the civil rights and liberties of the people and the states would be at the mercy of the proposed national government. Ratification was secured; but with a tacit understanding that a bill of rights should promptly be added which should restrict the national government in behalf of individual liberty. That the public men of that day thought of a bill of rights only in terms of restrictions on national power is emphasized by Hamilton's ingenious argument in the Federalist (No. 84) that since the proposed central government was one which possessed only the powers delegated to it, it would be not only unnecessary but unwise to prohibit it from doing things which were clearly outside the scope of its delegated authority.

When the first Congress convened the House of Representatives proposed seventeen amendments in the nature of a bill of rights One of these, the fourteenth, provided that "no state should infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press" This amendment, which was the only one restricting the powers of the states, was rejected by the Senate The substance of the others was consolidated into twelve amendments, ten of which were finally ratified by the states.

The First Amendment indicates by its own language that it is directed only against the federal government, for it begins, "Congress shall make no law . . ." The other amendments are couched in terms of general prohibition; and in spite of the perfectly clear historical evidence as to the intention of those who framed them, it came to be argued that these guarantees of civil liberty ought to be construed as restrictions upon state and federal governments alike.* Whether this view is correct is the issue involved in Barron v. Baltimore, the last constitutional decision in which Chief Justice Marshall participated.

The city of Baltimore in the paving of its streets had diverted from their natural course certain streams with the result that they made deposits of sand and gravel near Barron's wharf and thereby rendered

the water shallow and prevented the approach of vessels. The wharf which had previously enjoyed the deepest water in the harbor was rendered practically useless. A verdict of $4500 for Barron had been reversed by the state court of appeals and a writ of error was taken to the Supreme Court of the United States It was alleged by Barron that this action upon the part of the city constituted a violation of that clause of the Fifth Amendment which forbids taking private property for public use without just compensation He insisted that this amendment, being a guarantee in behalf of individual liberty, ought to be construed to restrain the states as well as the national government At the present time he quite obviously would have sought his redress under the Fourteenth Amendment.

In delivering the opinion of the court, Mr. Chief Justice Marshall said:

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the Judicial Act.

The plaintiff in error contends that it comes within that clause in the Fifth Amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not

of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments, as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government Some of them use language applicable only to Congress, others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed " No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or ex post facto law " This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states "No State shall enter into any treaty," etc. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action

of government on the people would apply to the state government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest

A state is forbidden to enter into any treaty, alliance, or confederation If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states, if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode

of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states We are therefore of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the Constitution of the United States This court, therefore, has no jurisdiction of the cause, and it is dismissed.

UNITED STATES v WONG KIM ARK

169 U. S 649, 42 L. Ed 890, 18 Sup. Ct. 456. 1898.

The Constitution of the United States from the first recognized citizenship of the United States but did not define it. It was generally assumed, however, that the English rule prevailed, which recognized as citizens those born within the allegiance of the country and subject to its protection. This rule, commonly called "jus soli," was in contrast to the rule prevailing on the European continent which followed the doctrine of "jus sanguinis," or the determination of citizenship by the nationality of the parents. However, in 1790, Congress enacted a law giving American citizenship to those born to American parents outside the country

In 1857 the Supreme Court had established an important exception to the rule that birth in the country conferred citizenship, by holding in the famous Dred Scott Case, 19 Howard 393, that a native born negro is not an American citizen.

The Fourteenth Amendment "recalled" the Dred Scott decision on this point and definitely defined United States citizenship in terms of birth in the country and subjection to its jurisdiction, thus enacting the English or "jus soli" doctrine into the Constitution The exact purport of the phrase "subject to its jurisdiction" was for some time the subject of dispute and uncertainty. In the Slaughterhouse Cases (p. 33) the court had gone out of its way to express the opinion that a child born in the United States to parents who were subjects of a foreign state is not born subject to the jurisdiction of the United States and would not, therefore, acquire citizenship by birth

This view, however, was rejected by the court in the case of United States v Wong Kim Ark, in which a majority of the judges held that a child born in the country to foreign parents acquires federal citizenship by birth despite the fact that his parents are not United States citizens and despite the further fact that being subjects of China the parents could not, under our laws, become citizens. A dissenting opinion took the view that the citizenship of children born here to foreign parents ought not to be held determined by the mere accident of birth but should be governed by treaty

Wong Kim Ark had been born in San Francisco in 1873 of Chinese parents who were subjects of the emperor of China but were permanently domiciled in the United States. He went to China in 1894 and upon his return to this country in 1895 the collector of the customs refused him admission to the country on the ground that he was a Chinese laborer, not a citizen, and not within any of the privileged classes named in the

Chinese Exclusion Acts then in force He sued out a writ of habeas corpus, claiming American citizenship on the ground of birth.

Mr Justice Gray delivered the opinion of the court, saying in part

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside "

In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States" and "natural-born citizen of the United States " By the original Constitution, every Representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States", and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President " The fourteenth article of amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws " And the

fifteenth article of amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. . .

The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the king The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, "Protectio trahit subjectionem, et subjectio protectionem,"—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king . . .

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence,

and in the United States afterwards, and continued to prevail under the Constitution as originally established. . . .

The first section of the Fourteenth Amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v Sandford, 19 Howard 393 (1857), and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the Slaughterhouse Cases. . . .

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words "all persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. . .

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the excep-

tions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States . . . It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when Secretary of State, in his report to the President on Thrasher's Case in 1851, and since repeated by this court. "Independently of a residence with intention to continue such residence, independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations.". . .

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties, and decisions upon that subject, always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution . .

Mr. Chief Justice Fuller, with whom concurred Mr Justice Harlan, rendered a dissenting opinion

UNITED STATES v LANZA

260 U. S. 377, 67 L Ed 314; 43 Sup. Ct. 141. 1922.

It was one of the universal maxims of the common law that no man should be brought into jeopardy of his life more than once for the same

offense. Protection against double jeopardy is guaranteed by the Fifth Amendment against invasion by the federal government, while a similar clause is found in the bills of rights of most of the state constitutions. A person is held to be in jeopardy when his trial has progressed to the point where he actually confronts the jury If convicted, he may waive his immunity from double jeopardy by an appeal to a higher court which may allow him a new trial; but if acquitted, further proceedings against him by the prosecuting authorities are barred, the government not even being allowed to appeal the case on the ground of error of law (United States v. Sanges, 144 U S 310, 1892).

One of the obvious results of living under our federal form of government is that every person is subject to the criminal jurisdiction of two separate governments, the state and the national It is entirely possible, therefore, for a single act to constitute an offense against the statutes of the United States and at the same time to be punishable under state law. This is true in the case of counterfeiting the national currency, corrupt practices in the conduct of congressional elections, assaults against federal officers, the larceny of goods moving in interstate commerce, violations of the Prohibition Amendment, etc In these cases it has long been held that a person may be tried and punished by both governments without violating the protection against double jeopardy That guarantee is violated only by a second trial for the same offense against the same sovereignty, not by a trial for the same act when it constitutes a separate and distinct crime against another sovereign

This doctrine has of course considerable practical effect in connection with the enforcement of the Prohibition Amendment, under which concurrent jurisdiction rests in the state and national governments In the present case Lanza had been convicted by the state courts of Washington for manufacturing, transporting, and possessing intoxicating liquor in violation of the state law and was sentenced to fine He was immediately thereafter indicted and brought to trial in the United States district court under the Volstead Act for manufacturing, transporting, and possessing the same liquor. He claimed that the second prosecution placed him in jeopardy twice for the same offense in violation of the Fifth Amendment inasmuch as both the state statute and the Volstead Act derived their force from the same authority, the Eighteenth Amendment. This contention was rejected, and the conviction in the district court was sustained.

Mr. Chief Justice Taft delivered the opinion of the court, saying in part

. . . The Eighteenth Amendment is as follows:

"Section 1 After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors

within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2 The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation "

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment, and in support of this position it is argued that both laws derive their force from the same authority,—the second section of the amendment,—and therefore that, in principle, it is as if both punishments were in prosecutions by the United States in its courts. .

To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of country-wide prohibition, state power would be excluded In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal Constitution, and left her free to enact prohibition laws applying to all transactions within her limits To be sure, the first section of the amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the states, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal Constitution . .

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment Each government, in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (Barron v. Baltimore, 7 Peters 243) and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so If a state were to punish the manufacture, transportation, and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute, or for its deterrent effect But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court, under a state law, for making, transporting, and selling intoxicating liquors, is not a bar to a prosecution in a court of the United States, under the federal law, for the same acts . . .

EX PARTE YARBROUGH THE KU KLUX CASES

110 U. S 651, 28 L. Ed 274, 4 Sup Ct 152. 1884

It has long been established that there is no necessary connection between citizenship and suffrage While it is usual to require that voters shall be citizens, there have been a dozen or more states which at some time or other have allowed aliens to vote before their naturalization was complete, and on the other hand the right to vote has been withheld from substantial classes of citizens, as for instance, minors, women (be-

fore the adoption of woman suffrage), and those who have no permanent residence in any state.

It should also be kept in mind that the determination of the actual qualifications for suffrage is left by the United States Constitution to the various states When the federal Constitution was framed any attempt to establish uniformity among the widely varying state qualifications for suffrage would have been difficult, if not impossible, and would have been so resented by the various states as to imperil the ratification of the Constitution Consequently it was provided that the congressional suffrage should be given to those qualified under state law to vote for members of the most numerous branch of the state legislature, while the method of choosing presidential electors was left to the discretion of the state legislatures It should be noted that the Fifteenth and Nineteenth Amendments do not guarantee any one the right to vote in a positive way; they merely stipulate that persons shall not be denied the right to vote because of race, or color, or sex.

In Minor v Happersett, 21 Wallace 162 (1875), the Supreme Court held that the right to vote is not one of the privileges and immunities of citizens of the United States which the states are forbidden by the recently adopted Fourteenth Amendment to abridge. That amendment does not deprive the states of their right to establish qualifications for the suffrage, nor does it operate to enfranchise any classes of citizens who have previously been denied the right to vote The case of Ex parte Yarbrough, on the other hand, established the doctrine that there is a certain sense in which the right to vote for federal officers may be regarded as a right of United States citizenship which will be accorded federal protection.

Yarbrough and others were members of one of the Ku Klux organizations prevalent in the south at the close of the Civil War. They were indicted in the federal district court in Georgia of the crime of conspiring together to intimidate a negro, named Berry Saunders, in the exercise of his right to vote for a member of the Congress of the United States. They were further charged with beating, bruising, wounding, and otherwise maltreating the negro in the carrying out of this conspiracy, and it was also alleged that they did all this because of the race, color, and previous condition of servitude of Saunders, and that to accomplish their unlawful purposes they went in disguise upon the public highway and upon Saunders' own premises. They were convicted and sentenced to the penitentiary. The federal statutes they were found guilty of violating prohibited under heavy penalty two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . ." or to "go in disguise on the highway, or on the premises of another, with intent

to prevent or hinder [such citizen in] his free exercise or enjoyment" of any such right; or to "conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward . the election of any lawfully qualified person ." as a presidential elector or as a member of Congress, etc It was alleged by Yarbrough that these laws were unconstitutional as being outside the scope of delegated congressional authority. In the powerful opinion of Mr. Justice Miller printed below upholding the validity of the acts, it is made clear that the right to vote for Representatives in Congress is a right which one gets from the federal Constitution, even though the precise measure of it is determined by suffrage qualifications set up by the state. In other words, it is a privilege of United States citizenship to vote for congressmen provided one has the qualifications which the state requires of those who vote for the most numerous branch of the state legislature. This privilege of federal citizenship Congress has full authority under the doctrine of implied powers to protect against individual or state aggression. The opinion is a peculiarly vigorous statement of the doctrine of national supremacy with respect to national rights and interests.

Mr. Justice Miller delivered the opinion of the court, saying in part:

. . . That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption

The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide

for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers,—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government or any branch of it by the Constitution. Article 1, section 8, clause 18

We know of no express authority to pass laws to punish theft or burglary of the treasury of the United States. Is there therefore no power in the Congress to protect the treasury by punishing such theft and burglary? Are the mails of the United States, and the money carried in them, to be left at the mercy of robbers and of thieves who may handle the mail, because the Constitution contains no express words of power in Congress to enact laws for the punishment of those offenses? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States, and the laws which confer that jurisdiction. It is said that the states can pass the necessary law on this subject, and no necessity exists for such action by Congress But the existence of state laws punishing the counterfeiting of the coin of the United States has never been held to supersede the acts of Congress passed for that purpose, or to justify the United States in failing to enforce its own laws to protect the circulation of the coin which it issues . . .

So, also, has the Congress been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution. This section declares that: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time make or alter such regulations, except as to the place of choosing Senators." It was not until 1842 that Congress took any action under the power here conferred, when, conceiving that the system of electing all the members of the House of Representatives from a state by general ticket, as it was called,—that is, every elector voting for

as many names as the state was entitled to Representatives in that house,—worked injustice to other states which did not adopt that system, and gave an undue preponderance of power to the political party which had a majority of votes in the state, however small, enacted that each member should be elected by a separate district, composed of contiguous territory. . . . And to remedy more than one evil arising from the election of members of Congress occurring at different times in the different states, Congress, by the act of February 2, 1872, thirty years later, required all the elections for such members to be held on the Tuesday after the first Monday in November in 1876, and on the same day of every second year thereafter

The frequent failures of the legislatures of the states to elect Senators at the proper time, by one branch of the legislature voting for one person and the other branch for another person, and refusing in any manner to reconcile their differences, led Congress to pass an act which compelled the two bodies to meet in joint convention, and fixing the day when this should be done, and requiring them so to meet on every day thereafter and vote for a Senator until one was elected. In like manner Congress has fixed a day, which is to be the same in all the states, when the electors for President and Vice-president shall be appointed .

Now, the day fixed for electing members of Congress has been established by Congress without regard to the time set for election of state officers in each state, and but for the fact that the state legislatures have, for their own accommodation, required state elections to be held at the same time, these elections would be held for congressmen alone at the time fixed by the act of Congress Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud? If this be so, and it is not doubted, are such powers annulled because an election for state officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all the electors, because state officers are to be

elected at the same time? . . These questions answer themselves, and it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the states, refrained from the exercise of these powers, that they are now doubted. But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground, and are to be upheld for the same reasons

It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by Congress does not stand on the same ground But the distinction is not well taken The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States . In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

This proposition answers, also, another objection to the constitutionality of the laws under consideration, namely, that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively. If this were conceded, the importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the state where he votes. It equally affects the government; it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the state, or by the laws of the United States, or by their united result. But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution

of the United States The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. Its language is: "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the same qualifications requisite for electors of the most numerous branch of the State legislature." Article 1, section 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress Nor can they prescribe the qualification for voters for those *eo nomine* They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law, in any sense which makes the exercise of the right to depend exclusively on the law of the state.

Counsel for petitioners, seizing upon the expression found in the opinion of the court of the case of Minor v Happersett, 21 Wallace 162, 178, that "the Constitution of the United States does not confer the right of suffrage upon any one," without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the state where the voting is to be done, therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the state for the description of the class But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors . . .

It is as essential to the successful working of this government that the great organisms of its executive and legislative branches

should be the free choice of the people, as that the original form of it should be so In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption. In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources. If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety If the government of the United States has within its constitutional domain no authority to provide against these evils,—if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint,—then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other.

The rule is discharged, and the writ of habeas corpus is denied.

GUINN v UNITED STATES

238 U S 347; 59 L. Ed 1340, 35 Sup Ct. 926 1915

The act of Congress of March 2, 1867, imposed negro suffrage on the ten southern states as a part of the congressional policy of Reconstruction, and three years later the Fifteenth Amendment undertook to establish, upon a permanent constitutional basis, the right of negroes to vote. It was only natural that such a policy should meet with most bitter hostility from the southern white man, and for upwards of two decades the negro was pretty effectively disfranchised throughout the south by intimidation, fraud, violence, and other irregular practices Such methods, however, provided no permanent solution of the problem, and gradually means were perfected by which the negro could be dis-

franchised in a technically constitutional way Mississippi proved a pioneer in this direction by requiring of the voter the payment of a poll tax and the display of the receipt therefor, and the ability to read the state constitution and to understand and interpret it reasonably when read to him Fortressed behind clauses such as these the white election officials did not find it difficult to exclude the negro without disturbing the white man. The Supreme Court of the United States held, in Williams v Mississippi, 170 U S. 213 (1898), that such provisions do not violate the Fifteenth Amendment since they do not deny to any one the right to vote because of his race or color A substantial number of southern states have adopted provisions modeled upon the Mississippi plan.

A more interesting device for negro disfranchisement, however, was the "grandfather clause." The essential features of this plan were two first, the establishment of a rigorous educational qualification (in some states a property qualification) drastic enough to permit the disfranchisement of most negroes, second, a provision that the qualification need not be met by those who were legal voters in 1866, or 1867 (prior to the adoption of the act of March 2, 1867), or who were lineal descendants of such legal voters The details of the plan varied from state to state, but some type of grandfather clause was adopted in these southern states. Louisiana in 1898, Alabama in 1901, North Carolina in 1900, Virginia in 1902, Georgia in 1908, Oklahoma in 1910, and Maryland (applicable to Annapolis) in 1908. In a good many cases the grandfather clause was of temporary duration, enough time being allowed so that presumably all those "whose grandfathers could vote" would have an opportunity to place their names on the permanent register of voters. Thus a six-year period was established in Georgia, and eight years in North Carolina

In the case of Guinn v. United States the validity of the Oklahoma grandfather clause (set forth in full in the court's opinion) was attacked as a violation of the Fifteenth Amendment and was held to be unconstitutional. At the same time a similar result was reached in Myers v Anderson, 238 U. S 368, with reference to the Maryland statute applicable to the city of Annapolis

The most recent phase of the problem of negro disfranchisement is to be found in a statute passed in Texas in 1923 which contains the provision that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot, and not count the same." This is apparently predicated on the doctrine laid down by the Supreme Court in the case of Newberry v United States, 256 U. S. 232 (1921), that a party primary is

not an election within the meaning of the Constitution, and it seems to be assumed that the Fifteenth Amendment would not apply to discrimination against the negro in such primary A decision on this point by the Supreme Court will be awaited with interest

Mr Chief Justice White delivered the opinion of the court, saying in part

. Suffrage in Oklahoma was regulated by section 4a, article 3, of the constitution under which the state was admitted into the Union Shortly after the admission there was submitted an amendment to the constitution making a radical change in that article, which was adopted prior to November 8, 1910 At an election for members of Congress which followed the adoption of this amendment, certain election officers, in enforcing its provisions, refused to allow certain negro citizens to vote who were clearly entitled to vote under the provision of the constitution under which the state was admitted; that is, before the amendment; and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed The persons so excluded based their claim of right to vote upon the original constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the Fifteenth Amendment .

Was the amendment to the constitution of Oklahoma . . . valid?

The original clause [of the Oklahoma constitution] so far as material, was this

"The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment.

"No person shall be registered as an elector of this State or be allowed to vote in any election held herein, unless he be able to read and write any section of the constitution of the State of Oklahoma, but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and

vote because of his inability to so read and write sections of such constitution Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote "

[The court then analyzes the issues presented in the briefs of counsel, from which the following paragraph is taken].

. the argument of the government in substance says No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment, and therefore cannot be here assailed either by disregarding the state's power to judge on the subject, or by testing its motive in enacting the provision The real question involved, so the argument of the government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment, and by necessary result re-creates and perpetuates the very conditions which the amendment was intended to destroy.

. . Let us consider these subjects under separate headings

1 *The operation and effect of the Fifteenth Amendment* This is its text·

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

"Section 2 The Congress shall have power to enforce this article by appropriate legislation "

[In this portion of the argument, the amendment referred to is the Fifteenth Amendment]

(a) Beyond doubt the amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would

fall to the ground In fact, the very command of the amendment recognizes the possession of the general power by the state, since the amendment seeks to regulate its exercise as to the particular subject with which it deals

(b) But it is equally beyond the possibility of question that the amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard to the command of the amendment But while this is true, it is true also that the amendment does not change, modify, or deprive the states of their full power as to suffrage except, of course, as to the subject with which the amendment deals and to the extent that obedience to its command is necessary Thus the authority over suffrage which the states possess and the limitation which the amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both

(c) While in the true sense, therefore, the amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect, that is to say, that as the command of the amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that, as a consequence of the striking down of a discriminating clause, a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. Ex parte Yarbrough, 110 U S. 651. . . . A familiar illustration of this doctrine resulted from the effect of the adoption of the amendment on state constitutions in which, at the time of the adoption of the amendment, the right of suffrage was conferred on all white male citizens, since by the inherent power of the amendment the word "white" disappeared and therefore all male citizens, without discrimination on account of race, color, or previous condition of servitude, came under the generic grant of suffrage made by the state

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the government at-

tributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the amendment by creating a standard of voting which, on its face, was in substance but a revitalization of conditions which, when they prevailed in the past, had been destroyed by the self-operative force of the amendment

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance*

The inquiry, of course, here is, Does the [Oklahoma] amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us, for the purpose of the analysis, to recur to the text of the [Oklahoma] suffrage amendment Its opening sentence fixes the literacy standard which is all-inclusive, since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for The provision is this:

"But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution."

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the government attributes to it than does the mere statement of the text It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, pro-

hibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment, and makes that period the controlling and dominant test of the right of suffrage In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the amendment, to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.

. . these considerations establish that the standard fixed on the basis of the 1866 test is void, . . that the 1866 standard never took life, since it was void from the beginning because of the operation upon it of the prohibitions of the Fifteenth Amendment

[The court then proceeds to establish the invalidity of the literacy test, because of its association with the void grandfather clause portion of the Oklahoma amendment]

DARTMOUTH COLLEGE CASE

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD

4 Wheaton 518; 4 L Ed. 629 1819

When the framers of the Constitution forbade the states to pass laws impairing the obligation of contracts they had in mind the or-

dinary executory contracts between man and man, which during the "critical period" had so frequently been interfered with by the enactment of "stay laws," legal tender laws, and other legislation for the benefit of insolvent debtors. The first interpretation of the contract clause by the Supreme Court, however, was given in the case of Fletcher v Peck, 6 Cranch 87 (1810), which did not relate to this sort of contract at all, but which involved the question whether an executed contract in the form of a legislative grant of land made by the state itself through its legislature could be later rescinded by the state The court held here that the grant of land, even though made under circumstances of the most scandalous corruption, is a contract within the meaning of the constitutional provision and cannot be rescinded by the state after the land in question has passed into the hands of innocent purchasers It is interesting to note that at the very end of his opinion in this case Chief Justice Marshall left the legal profession in some doubt as to the precise ground upon which he held the rescinding act to be void by saying· "The State of Georgia was restrained, either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States, from passing a law," etc. This plainly suggests that the rescinding act might have been held void as an interference with vested rights

Of far greater significance was the Dartmouth College Case, in which the contract clause was given an even wider application In 1769 Dartmouth College was chartered by the English Crown. The charter created a board of trustees with power to choose a president and to fill vacancies in its own membership In 1779 the first president, dying, was succeeded by his son John Wheelock, who seems to have lacked the tact necessary for a good administrator. Difficulties between Wheelock and his trustees grew apace, at first personal, then sectarian, and finally political ' The Wheelock faction came to comprise the Presbyterian Republicans throughout the state, while the board of trustees drew their support from the Congregationalist Federalist group. In 1815 Wheelock was removed from the presidency of the college by the board ' In 1816 the Republicans carried the state, electing the governor and a majority in the legislature, and forthwith passed a law entirely reorganizing the government of the college The name of the institution was changed to Dartmouth University; the trustees were increased from twelve to twenty-one and were to be appointed by the governor and council; a body of twenty-five overseers was created, twenty-one of whom were to be appointed by the governor and council with a veto power on the acts of the trustees . The president was required to report annually to the governor on the management of the college, and the governor and council were empowered to "inspect" the college ev-

ery five years and report to the legislature Promptly the old trustees refused to be governed by the provisions of the law, whereupon the new trustees ousted the old trustees from the college buildings, called themselves the new university, and elected Wheelock as the new university president The old trustees, nothing daunted, gathered about them their sympathizers among the professors, hired rooms nearby, and continued to operate as the "college," most of the students remaining loyal to the old regime. Woodward, however, the secretary and treasurer of the original college, sided with the Wheelock faction and the new university and now refused to allow the "college" to have possession of the seal, records, and account books which were in his possession[1] The trustees of the old "college" thereupon brought an action of trover (a proceeding to recover the value of property wrongfully withheld) against Woodward, thus raising the general question of the constitutionality of the statute of 1816 reorganizing the college

The case was argued before the supreme court of New Hampshire in 1817 Little reference was made to the contract clause. The state court decided against the college on the ground that the institution had become public in character and as such was subject to state control. The case was taken to the United States Supreme Court on a writ of error and was argued in 1818 Webster, who was not yet at the height of his fame, represented the college and made an argument which has long been celebrated. He laid much more emphasis on the necessity of protecting vested rights than upon the contract clause. Rumor has it that the court was divided in its opinion on the case at the close of the argument and that Marshall, who favored the college, postponed the decision until the next term and in the meantime won over his colleagues to his own position At the opening of the next term of court the decision was handed down in favor of the college.

The doctrine of this case, that a corporate charter is a contract which may not be impaired by legislative enactment, has been most bitterly criticized as making it possible for corrupt and ignorant legislatures irrevocably to grant away privileges and rights contrary to the public interest and welfare There can be no doubt that it did create opportunities for legislative corruption At the same time it put the public upon its guard with reference to corporate grants and it emphasized the importance of good faith at a time when public opinion seemed willing to sponsor interference with promises. In an economic sense the decision was of great importance in giving to those who invested money in corporate enterprises assurance that the corporations would be free from legislative interference, and it thus encouraged the expansion of business enterprise in the fields of railroad construction, insurance, commerce, and industry.

The doctrine of the Dartmouth College Case was somewhat softened

by succeeding decisions of the Supreme Court. In the case of Charles River Bridge v. Warren Bridge, 11 Peters 420 (1837), it was held that the terms of a charter contract must be strictly construed and that no rights or privileges can be held granted away by the public by mere implication In the case of Ogden v Saunders, 12 Wheaton 213 (1827), the court decided that the obligation of a contract within the meaning of the contract clause consists not merely in the promise or agreement between the parties but also in the law applicable to the subject which is in existence when the contract is made This rule makes it possible for the states to pass general laws reserving the right to amend or repeal corporate charters under certain circumstances. Finally, in a group of cases of which Stone v Mississippi, 101 U. S 814 (1880), is typical, the important principle was established that the state cannot contract away the authority at any time to pass laws for the preservation of the health, safety, and morals of the community.

Mr Chief Justice Marshall, in delivering the opinion of the court said in part:

. This court can be insensible neither to the magnitude nor delicacy of this question The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a state is to be revised· an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the Constitution But the American people have said, in the Constitution of the United States, that "no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts" In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the Constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control, and, however irksome the task may be, this is a duty from which we dare not shrink . .

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have

been made for the object, which will be conferred on the corporation as soon as it shall be created The charter is granted, and on its faith the property is conveyed Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the Constitution of the United States?

2 Is it impaired by the acts under which the defendant holds?

1 On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control That even marriage is a contract, and its obligations are affected by the laws respecting divorces That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some indi-

vidual could claim a right to something beneficial to himself, and that since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description, to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause.

Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being, whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character. . .

[In the course of his comment upon the charitable objects of the donors of Dartmouth College occurs Marshall's classic description of a corporation]

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality, properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves, that they are not public

officers, nor is it a civil institution, participating in the administration of government, but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation . .

According to the theory of the British constitution, their Parliament is omnipotent To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid, but its power is not questioned. Had Parliament, immediately after the emanation of this charter and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged Yet then, as now, the donors would have had no interest in the property, then, as now, those who might be students would have had no rights to be violated, then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties It is a contract made on a valuable consideration It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution

. . It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger

and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution in making it an exception

On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed, as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all . . .

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court

2. We next proceed to the inquiry whether its obligation has

been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the Revolution the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the state. But the Constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated that the act "to amend the charter and enlarge and improve the corporation of Dartmouth College" increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly and acting through the agency of trustees and overseers no essential difference is perceived. The whole

power of governing the college is transformed from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given, they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, molded according to the will of its founders and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general, but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees, and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and

other professors from their own body. This is a power not entirely unconnected with an interest Even if the proposition of the counsel for the defendant were sustained, if it were admitted, that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest, yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the Constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States, and that the judgment on this special verdict ought to have been for the plaintiffs The judgment of the state court must, therefore, be reversed.

Mr Justice Washington and Mr Justice Story rendered separate concurring opinions. Mr Justice Duvall dissented.

HURTADO v. CALIFORNIA

110 U. S 516, 28 L. Ed. 232; 4 Sup. Ct 111 1884.

While we have come to think of the clauses of the Constitution forbidding the deprivation of life, liberty, or property without due process of law as restrictions by which the courts test the validity of social and economic legislation, it is well to keep in mind that due process of law was originally construed as a limitation on governmental procedure, or the methods of law enforcement. This is still an important phase of the problem, and under the due process clauses the courts are continually scrutinizing forms of procedure used in courts and administrative tribunals, and in the exercise of such powers as those of taxation and eminent domain.

So vague and general a term as due process of law is by no means easy to define, and the courts have contented themselves by developing the meaning of it by the process of considering each case on its merits and deciding whether the procedure complained of is or is not due process of law In so doing recourse has been had, naturally, to certain general principles and tests which experience has shown to be applicable. One

of these, grounded on the fact that due process of law, or the law of the land, was a concept long known in English and American law, was early established in the case of Murray's Lessee v. Hoboken Land and Improvement Co., 18 Howard 272 (1856), to the effect that a form of procedure which was supported by long established custom in the law was not failing in due process of law. In other words, what is old in procedure is due process.

It was of course natural for conservative minds to seek to establish the converse of this proposition, that what is not old in procedure is not due process of law, and the Hurtado case is of very great importance because it rejected so dangerous a notion. Hurtado was convicted of murder and sentenced to be hanged. He alleged that the procedure by which he had been convicted was lacking in due process because instead of being indicted by a grand jury he had been prosecuted upon what is known as an information, a formal accusation presented by the prosecuting officer. The court repudiated the suggestion that trial upon an information is a denial of due process merely because it is a new type of procedure. Its constitutional validity depends upon its intrinsic character which was found not to be violative of any fundamental rights of the accused. In line with this decision the Supreme Court has held that a considerable number of the attributes of the ordinary common law jury trial can be done away with without a denial of due process of law. In Twining v. New Jersey, 211 U. S. 78 (1908), the court held that due process does not require exemption from self-incrimination; and in Jordan v. Massachusetts, 225 U. S. 167 (1912), the court said: "Indeed the requirement of due process does not deprive a state of the power to dispense with jury trial altogether." It must be borne in mind, however, that the federal government is restricted in these matters by the specific clauses of the federal bill of rights guaranteeing indictment by grand jury, jury trial, etc.

The vast practical importance of the rule here laid down lies in the fact that a good deal of our civil and criminal procedure was borrowed bodily from England nearly a century and a half ago and stands in sad need of revision to meet the needs of modern times and problems. If due process of law prevented the adoption by the several state governments of any procedural methods except those sanctioned by long established usage all hope of procedural reform would have to be abandoned.

Mr. Justice Matthews delivered the opinion of the court, saying in part:

. . . The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when

applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the states respectively to dispense with in the administration of criminal law.

. . . it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the twenty-ninth chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury. . . .

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Murray's Lessee v. Hoboken Land & Improvement Company, 18 Howard 272. There Mr. Justice Curtis, delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

"To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political con-

dition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law"; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. . . .

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language:

"It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 History of England, 221.

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice,—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. . . .

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. . . .

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as a consequence of a regular judicial trial, conducted precisely as in cases of indictments. . . .

For these reasons, finding no error therein, the judgment of the supreme court of California is affirmed.

Mr. Justice Harlan rendered a dissenting opinion.

GITLOW v. NEW YORK

268 U. S. 652; 69 L. Ed. 1138; 45 Sup. Ct. 625. 1925.

While both the national and state constitutions forbid the abridgment of freedom of speech or of the press, and while such guarantees are generally agreed to be indispensable in any government resting upon public opinion, it would not be easy to give a clear and succinct statement of what freedom of speech and freedom of the press actually are. This is because these important civil rights, like most others, are relative in character, depending upon the circumstances which in each individual case surround their exercise. It will be readily agreed that certain restrictions upon public utterances and publications are necessary for the reasonable protection of the safety and morals of the community. As Mr. Justice Holmes expressed it in the Schenck case mentioned below, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." In every case in which it has been alleged that freedom of speech or press has been unduly restricted it will be found that those imposing the restrictions have firmly believed them necessary for the public protection. The question which comes before the courts in these cases is, therefore, a question of degree and one which involves the balancing of the public and private interests involved.

Perhaps the most conspicuous and interesting instance in our history of interference with freedom of expression never came before the Supreme Court of the United States. The Sedition Act of 1798 provided among other things for the severe punishment of false, scandalous, and malicious writings against the government, either house of Congress, or the President, if published with intent to defame any of them or to excite against them the hatred of the people, or to stir up sedition. It was limited in operation to two years. Ten persons were convicted under it and many others were indicted but not tried. Its enactment and enforcement called forth great popular indignation and President Jefferson upon assuming office pardoned all persons still imprisoned under its provisions, and many years later Congress refunded with interest the fines imposed.

The relative character of the right of free speech and press becomes particularly obvious in time of war. Where is the line to be drawn between legitimate and salutary freedom of discussion and utterances which, by reason of their disloyal or seditious character, must be deemed incom-

patible with the public safety? This is a delicate and important question. During the Civil War such interferences with freedom of speech and press as occurred were perpetrated by military officers under the sanction of martial law, and no question of the validity of these acts of repression ever came squarely before the Supreme Court. The World War brought forth a fresh grist of restrictive legislation, both state and federal, and numerous judicial questions arose as to the validity of these acts and their application to specific cases. Most conspicuous of these laws were the Espionage Act of 1917, which penalized any circulation of false statements made with intent to interfere with military success as well as any attempt to cause disloyalty in the army or navy or to obstruct recruiting; and the Sedition Act of 1918, which made it a crime to say or do anything which could obstruct the sale of government bonds, or to utter or publish words intended to bring into contempt or disrepute the form of government of the United States, the Constitution, flag, uniform, etc., or to incite resistance to the government or promote the cause of its enemies. Nearly a thousand persons were convicted under these two acts. Their validity was sustained by the Supreme Court in several cases coming up after the close of the war. Of these the most interesting is the case of Schenck v. United States, 249 U. S. 47 (1919), in which Mr. Justice Holmes stated the test which he felt ought to govern the application of the statutes to concrete cases of questionable utterances: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree."

Perhaps even more important than these wartime cases involving freedom of expression is the case of Gitlow v. New York, in which was presented to the Supreme Court the question of the validity of the Criminal Anarchy Act of New York passed in 1902 and violated by Gitlow long after the World War was over by the publication of a document advocating a proletariat revolution. The opinion of the court is instructive, therefore, as to the tests to be applied in time of peace to legislative restrictions upon freedom of press and speech. It is interesting to note in this connection that while under the doctrine laid down in Barron v. Baltimore (page 43) the guarantees of free speech and press in the First Amendment apply only to the national government, this case assumes that a reasonable freedom of expression is part of the liberty which the states are forbidden by the Fourteenth Amendment to take away without due process of law. The provisions of the statute and the nature of Gitlow's offense are set forth in the opinion.

Mr. Justice Sanford delivered the opinion of the court, saying in part:

Benjamin Gitlow was indicted in the supreme court of New York, with three others, for the statutory crime of criminal anarchy. . . .

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"Section 160. Criminal anarchy defined.—Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"Section 161. Advocacy of criminal anarchy.—Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . ,

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendants had advocated, advised, and taught the duty, necessity, and propriety of overthrowing and overturning organized government by force, violence, and unlawful means, by certain writings therein set forth, entitled, "The Left Wing Manifesto"; the second, that the defendants had printed, published, and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count, advocating, advising, and teaching the doctrine that organized government should be overthrown by force, violence, and unlawful means.

. . . It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the state to speak to branches of the Socialist party about the principles of the Left

Wing, and advocated their adoption; and that he was responsible [as business manager] for the Manifesto as it appeared, that "he knew of the publication, in a general way, and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin. Coupled with a review of the rise of Socialism, it condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism," based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action," for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat," the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg were cited as instances of a development already verging on revolutionary action and suggestive of proletarian dictatorship, in which the strike workers were "trying to usurp the functions of municipal government"; and Revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

. . . The sole contention here is, essentially, that, as there was no evidence of any concrete result flowing from the publication of the Manifesto, or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: first, that the "liberty" protected by

the Fourteenth Amendment includes the liberty of speech and of the press; and second, that while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted, or likely"; and as the statute "takes no account of circumstances," it unduly restrains this liberty, and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then, is whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression, in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising, or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. . . .

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances, and, through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events: it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts

usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overwhelming organized government by force, violence, and unlawful means, but action to that end, is clear.

For the present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states. . . .

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. 2 Story, Const. 5th ed. section 1580, p. 634. . . . Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . . Thus it was held by this court in the Fox case, that a state may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. Freedom of speech and press, said Story (supra), does not protect disturbances of the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or

imperil the government, or to impede or hinder it in the performance of its governmental duties. . . . It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. . . . And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. . . . In short, this freedom does not deprive a state of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. . . .

By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. . . . That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. . . .

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state, unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. . . . In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional, and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect were to bring about the substantive evil which the legislative body might prevent. Schenck v. United States, 249 U. S. 51; Debs v. United States, 249 U. S. 215. And the general statement in the Schenck case (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument,—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has

previously determined the danger of substantive evil arising from utterances of a specified character. . . .

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the court of appeals is affirmed.

Mr. Justice Holmes dissented:

Mr. Justice Brandeis and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the United States. If I am right, then I think that the criterion sanctioned by the full court in Schenck v. United States, 249 U. S. 47, 52, applies: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent." It is true that in my opinion this criterion was departed from in Abrams v. United States, 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U. S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community,

the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result; or, in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

LOCHNER v. NEW YORK

198 U. S. 45; 49 L. Ed. 937; 25 Sup. Ct. 539. 1905.

It has been pointed out in the discussion of the Slaughterhouse Cases (page 33) that the primary purpose lying back of the adoption of the Fourteenth Amendment was to guarantee to the newly freed negro certain fundamental civil rights. To this end the provisions were inserted, along with others, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." So far as the negro is concerned these clauses have been of small importance indeed; but by an interesting and unforeseen development these clauses, especially the due process of law clause, have furnished the tests by which the courts judge the validity of practically all of the social and economic legislation enacted by the states in the exercise of their police power; they have imposed upon the Supreme Court the most persistent and difficult questions which that tribunal has had to face, and their application to social and economic reforms has subjected the court to more bitter criticism in recent times than has any other phase of its work.

Due process of law was not a new concept in our constitutional law; however, it was not until the period before the Civil War that the due process clauses of the state constitutions had come tentatively to be construed as limitations upon the substance or content of legislation; and when, in the Slaughterhouse Cases, Mr. Justice Miller stated that the due process clause did not restrict the police power of the state, he was merely giving it a long-standing and orthodox interpretation.

This construction of the due process clause, however, was not destined to persist. The close of the Civil War ushered in a veritable industrial and economic revolution marked by the enormous expansion of the

interstate market through increased railroad facilities, the development of large-scale production carried on by huge accumulations of capital, and the development of a fairly well-defined labor class. Social and economic conditions of a new and complex nature sprang up, and these the legislatures of the various states attempted to deal with by statutes passed in the exercise of their police power. Some of these related to the control of the railroads and the establishment of the charges made by public utilities, others to the relations between laborer and employer, the latter now collectively designated as "capital." Naturally, organized industry looked upon these legislative efforts to ameliorate such things as factory conditions and hours of labor as intolerable interferences with the employer's private affairs.

During the development of the situation just described the courts had been continuously besieged to depart, chiefly on behalf of capital, from the narrow construction of due process of law set forth in the Slaughter-house Cases and to apply that clause as a broad and general restraint upon the state police power. In a case argued before the Supreme Court in 1885, San Mateo County v. Southern Pacific R. R. Co., 116 U. S. 138, Mr. Roscoe Conkling, who had been a member of the Committee of Fifteen on Reconstruction which had drafted the Fourteenth Amendment, produced in court the unpublished journal of the committee in support of his contention that the amendment had not been originally intended by its framers for the exclusive protection of the negro race. As a result of the subtle pressure of such influences as these, together with the changes in personnel in the Supreme Court itself, that tribunal ultimately came to assume the position which many had felt it ought originally to have taken, and stood openly for the doctrine that the Fourteenth Amendment does impose judicially enforceable restrictions upon social legislation passed by the states.

But what constitutes deprivation of life, liberty, or property without due process of law in such a connection? This question the court wisely declared it would not attempt to settle by the enunciation of any general doctrine but would dispose of separately in each case which came before it for decision. It is not possible, therefore, to define due process of law authoritatively beyond saying that it operates to prevent the enactment by the states of such measures as may be arbitrary and unreasonable in character, with what constitutes the test of "arbitrary" and "unreasonable" depending largely upon the opinion of the tribunal applying it. Every exercise of police power necessarily imposes restraint in some measure upon individual liberty or the free use of individual property; and if it is to be justified it must be upon the ground that it is necessary for the protection of the public health, morals, safety, good order, or general welfare. In other words, the due process test concretely means this: if the court believes that the infringement of individual rights in-

volved in the statute is warranted by the pressing nature of the social need it is established to promote, then the law does not violate due process of law; but if it is not so warranted, then the due process clause is held to be contravened.

It can readily be seen that in the practical settlement of these problems the personal equation looms large, for what may seem arbitrary to one person may not seem so to another; and this accounts for the fact that the Supreme Court at certain times and in certain cases has construed the due process clause in a way which is extremely difficult to reconcile with its decisions in other cases and at other times. It was entirely natural that in its early application of these principles the courts should react to the problems which arose in the light of the background of their training and the legal and economic philosophy prevalent at the time that training was received. This philosophy was individualistic in character; and regulations of labor and other social conditions based upon the assumption that the state ought to intervene at the expense of the individual for the benefit of a particular group or class in economic society were looked upon with horror by the courts. The state courts were more unsympathetic to social reform than was the Supreme Court of the United States, and held void many laws as a violation of due process. Could the states have appealed these cases to the Supreme Court of the United States they might have obtained there a more liberal interpretation of due process; but at that time (and up to the passing of the Judiciary Act of 1914) there was no way for such a case to come before the Supreme Court. Even now the case cannot be appealed if the law is held to violate the due process clause of the state constitution.

This early individualistic interpretation by the courts of due process of law found finally a definite basis in the development during the eighties of the doctrine of "liberty of contract." The first case turning upon this doctrine was decided by the supreme court of Pennsylvania in 1886, Godcharles v. Wigeman, 113 Pa. State 431, but the theory has since been generally incorporated into the doctrine of due process of law as applied by both state and federal courts. The concept of "liberty of contract" was both plausible and alluring. It asserted in substance that when two parties, neither of whom was under any legal disability, came together to make a contract which was not contrary to public policy the legislature had no right to interfere and to dictate the terms of the agreement. Of course such liberty of contract was not absolute, but the weight of opinion was that only the strongest public necessity afforded justification for its violation. The application of this doctrine to the problem of protective labor legislation produced, however, some very startling results, due in large measure to the naïve assumption by the courts that the individual employee of a great industrial corporation possessed full liberty of contract and could dicker with his employer

upon equal terms. Naturally, as time went on the courts found frequently that this vaunted liberty of contract was infringed by the laws regulating hours of labor, method and time of wage payment, employer's liability, factory conditions, and similar matters.

As has been said, most of these decisions now regarded as more or less reactionary were rendered by the state courts. They had been invalidating state social legislation for nearly twenty years before the Supreme Court followed suit. The case of Lochner v. New York is interesting for two reasons: first because it is the earliest and one of the most important cases in which the Supreme Court invalidated a state law under the liberty of contract phase of the due process clause, and secondly because it contains Mr. Justice Holmes' vigorous dissenting opinion upholding the validity of such reform laws. Lochner was convicted of violating a New York statute called the Labor Law, which provided that no employee should be "required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day unless for the purpose of making a shorter day on the last day of the week." The legislature had proceeded upon the assumption that the conditions in the baking industry were such as to demand the intervention of the state in behalf of the employees. That such protection was reasonably necessary the majority of the court did not agree, and accordingly held that there was no adequate justification for this infringement of the private rights of the employer. Four justices dissented on the ground that there was sufficient support for the view of the legislature to make it a debatable question whether the law was arbitrary or not, and that when such was the case the courts should not override the legislative judgment. The dissenting opinion of Mr. Justice Holmes has become almost a classic as a statement of the more liberal judicial attitude toward the question of the validity of social and economic legislation under the Fourteenth Amendment.

The decision in the Lochner case was bitterly criticized. It was commonly asserted that it embodied a legal and economic philosophy which belonged to the middle of the nineteenth century. However, it was succeeded within a few years by a series of decisions upon somewhat similar questions which seemed to indicate that the Supreme Court had adopted a liberal point of view toward social legislation. Notable amongst these cases were Muller v. Oregon, 208 U. S. 412 (1908), upholding the Oregon ten-hour law for women, and Bunting v. Oregon, 243 U. S. 426 (1917), sustaining the Oregon ten-hour law applicable to industrial employees generally. In these and several other cases the Supreme Court was aided by the rather unusual briefs filed in support of the statutes under review. These were prepared by Mr. Brandeis, before his appointment to the Supreme Court, and Professor Frankfurter of the Harvard Law School,

aided by Miss Goldmark and Miss Dewson of the National Consumer's League. They detailed the social and economic conditions which seemed to justify the legislation which had been enacted. These briefs constituted a new technique in the arguing of such cases and had undoubtedly considerable influence upon the court. It was generally supposed that the philosophy of the Lochner case had been permanently abandoned in favor of a point of view founded upon a somewhat more sympathetic acquaintance with the actual conditions which the legislatures were trying to regulate. That this was a false hope is indicated, however, by the recent decision in the District of Columbia Minimum Wage Case, Adkins v. Children's Hospital, 261 U. S. 525 (1923), in which a minimum wage law applicable to women and children was declared unconstitutional by a five-to-three decision. The majority opinion rests very largely upon the Lochner case as authority and embodies the same judicial attitude toward police legislation as does the earlier case.

Mr. Justice Peckham delivered the opinion of the court, saying in part:

. . . The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal Constitution. . . . Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. . . .

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the

right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state. . . .

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question

would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employee, to make contracts for the labor of the latter under the protection of the

provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight

hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real-estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme.

We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn

their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. . . .

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more like to be so. . . . The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary.

. . . It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution. . . .

Mr. Justice Harlan, with whom concurred Mr. Justice White and Mr. Justice Day, in dissenting said in part:

. . . I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. . . .

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionary establishments in excess of eighteen hours each

day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. . . .

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours steady work each day, from week to week, in a bakery or confectionary establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amendable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. . . .

Mr. Justice Holmes in dissenting said:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this

interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. Otis v. Parker, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. Holden v. Hardy, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty" in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men

whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

NOBLE STATE BANK. v. HASKELL

219 U. S. 104; 55 L. Ed. 112; 31 Sup. Ct. 186. 1911.

Mr. Justice Holmes has been for many years perhaps the leading exponent of an extremely liberal judicial attitude toward the application of the Fourteenth Amendment to social and economic legislation passed under the police power of the states. In a number of cases his views have been shared by other members of the court, but in others he has found himself in a minority and his opinions have been dissenting opinions. The philosophy which he expounds with reference to due process of law in police power cases is, in brief, that the legislative judgment that a particular police regulation is reasonable and justified by conditions is entitled to such a high degree of respect that if reasonable people acting reasonably could reach such a conclusion, then that finding should be binding upon the court. In short, if the question of constitutionality is reasonably debatable the courts should sustain the law even though they feel strongly that it is undesirable. This is, of course, not the theory of one judge alone; but Justice Holmes' efforts to make it the established doctrine of the court in all such cases have had a very wide influence. It is this theory which governs the opinion in the case of Noble State Bank v. Haskell. The essential provisions of the Oklahoma statute providing for the guarantee of bank deposits, a plan urgently advocated by Mr. Bryan during the presidential campaign of 1908, are set forth in the opinion. The significance of the case lies not so much in the fact that the statute was held valid as in the judicial attitude towards the question of the validity of the law which the opinion reflects.

In delivering the opinion of the court Mr. Justice Holmes said, in part:

. . . This act creates the [State Banking] Board and directs it to levy upon every bank existing under the laws of the state an assessment of one per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be five per cent. The purpose of the fund is shown by its name.

It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the Bank Commissioner, if its cash immediately available is not enough to pay depositors in full, the Banking Board is to draw from the Depositors' Guaranty Fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the Guaranty Fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with article I, section 10, and the Fourteenth Amendment of the Constitution of the United States.

. . . we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties of the bill of rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the lawmaking power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up . . . still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. . . . And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. . . . At least, if we have a case within the reason-

able exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. . . . The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. . . . So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. . . .

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing

sides. . . . It will serve as a datum on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. . . .

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described cooperation are necessary safeguards, this court certainly cannot say that it is wrong. . . .

Judgment affirmed.

MEYER v. NEBRASKA

262 U. S. 390; 67 L. Ed. 1042; 43 Sup. Ct. 625. 1923.

Most of the cases which have come before the Supreme Court under the due process clause have arisen out of complaints that persons were being deprived of property without due process of law; even in the cases involving abridgment of liberty of contract the liberty infringed has been the liberty to make contracts with reference to property. Recently one or two cases have come up on the ground of an alleged deprivation of liberty in a somewhat more narrow and definite sense, and the Supreme Court has had an opportunity to throw light upon the meaning of the term liberty as used in the Fourteenth Amendment and the nature and degree of protection to be accorded it. Meyer v. Nebraska is one of these cases.

This case arose out of a statute passed by the legislature of Nebraska in 1919 providing, first, that "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any

subject to any person in any language other than the English language," and secondly, that "Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade. . . ." Violation of the law was made a misdemeanor punishable by fine or imprisonment. Meyer was convicted of teaching the subject of reading in the German language in a parochial school to a child of ten years who had not passed the eighth grade. Upon appeal to the supreme court of Nebraska his conviction was sustained, that court holding that the law was a reasonable and proper exercise of the police power of the state in order to hasten and assure the assimilation of foreigners and to prevent the children of the state from being educated in such a way as to inculcate in them ideas and sentiments foreign to the best interests of the country. This decision was reversed by the Supreme Court of the United States. It should be noted that the basis of the court's decision is that the liberty of teachers and parents with reference to instruction in private schools is infringed by the statute. It does not hold that the state could not restrict the teaching of foreign languages in the public tax-supported schools of the state. In a case decided at the same time, Bohning v. Ohio, 262 U. S. 404 (1923), the court unanimously invalidated an Ohio statute, similar in purport to that of Nebraska, but containing the proviso that "the German language shall not be taught below the eighth grade in any of the elementary schools of this state."

Of vastly more intrinsic importance than this case is the recent decision of the Supreme Court holding unconstitutional the Oregon Compulsory Education Act in the case of Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U. S. 510, decided in 1925. The statute in question was passed in 1922 by operation of the popular initiative, and provided that beginning in September, 1926, every parent, guardian, or other person having control or custody of a child between the ages of eight and sixteen years should send him to a public school for the period of time a public school shall be held during the current year. Failure to do so was declared a misdemeanor. In other words, all private schools were legislated out of existence. Alleging the unconstitutionality of this law action was brought to enjoin attempted enforcement of it by two private schools in the state of Oregon, one the Society of the Sisters of the Holy Names of Jesus and Mary, a Catholic school, the other, the Hill Academy, a secular military school. The case was brought first in the federal district court, which held the law void, and an appeal was taken to the Supreme Court of the United States. The case was watched with great interest throughout the country and the decision reached, holding the Oregon law unconstitutional, is of first importance. The court was unanimous in holding that the act arbitrarily interfered with the liberty of parents to direct the education

of their children, as well as the liberty of teachers and organizers of private schools to engage in innocent and useful occupations. "The fundamental theory of liberty," declared the court, "upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." Here again it should be noted that nothing is said to prevent the state from regulating its public schools at its discretion, or compelling parents to send children to some school. The public school, however, may not be made an absolute educational monopoly by the state. The opinion in this case relied heavily upon the opinion in Meyer v. Nebraska, and is less instructive than that in the earlier case here given.

Mr. Justice McReynolds delivered the opinion of the court, saying in part:

. . . The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall . . . deprive any person of life, liberty, or property without due process of law."

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. . . .

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the

right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable,—essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The supreme court of the state has held that "the so-called ancient or dead languages" are not "within the spirit or the purpose of the act." . . . Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type, and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,—to those who speak other languages as well as to those born

with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,—a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquillity has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition,

with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes rendered a dissenting opinion, in which Mr. Justice Sutherland concurred.

IV. THE PRESIDENT AND EXECUTIVE POWER

EX PARTE MILLIGAN

4 Wallace 2; 18 L. Ed. 281. 1866.

It is one of the evils of war that there seems frequently to be a certain incompatibility between the demands of military necessity and a punctilious regard for the civil rights of the individual. Certainly in war emergencies the citizen finds his liberty curtailed and his rights abridged in ways which in times of peace would seem intolerable. There is plenty of evidence that President Lincoln, largely supported by public opinion, definitely proceeded during the Civil War upon the theory that questions of constitutional power were to be dealt with in the light of the great objective of preserving the Union. No President has ever invaded private constitutional rights more flagrantly, or from worthier motives than he. This may be illustrated by the famous case of Ex parte Merryman. Fed. Case No. 9487 (1861). Merryman was a southern agitator residing in Maryland who persisted during the early days of the war in conduct and utterances which in the judgment of the military authorities hindered the success of the northern cause. He was thereupon arrested and locked up in the military prison at Fort McHenry. Merryman promptly petitioned Chief Justice Taney, sitting in his capacity as circuit judge, for a writ of habeas corpus. Taney issued the writ, directed to the military commander of the fort. The commander did not honor the writ, replying that he was authorized by the President to suspend the writ of habeas corpus, but would seek further instructions; and he declined to obey the writ further. Taney thereupon issued a writ of contempt against the general and sent the United States marshal to serve it. The marshal reported that he had not been allowed to enter the outer gate of the fort, although he had sent in his card, and that he had not been able to serve the writ. Taney, while protesting that the marshal had a perfect right to summon a *posse comitatus* and storm the fort, excused him from that duty, and contented himself with writing a full account of the entire case which he addressed to President Lincoln and which concluded with the observation that it now remained for the President, acting in fulfillment of his solemn oath of office, to enforce the laws, execute the judgment of the court and release the prisoner. Lincoln made no answer whatever to this document and Merryman spent the period of the duration of the war in prison.

No case of this kind came to the Supreme Court while the war was in progress, although in 1864 an attempt was made to bring before that tribunal on a writ of habeas corpus the validity of the arrest of the notorious agitator, Vallandigham. The court held that it was without jurisdiction and dismissed the case. It is interesting to speculate what the results might have been had the Supreme Court locked horns with the President in such a case; if, for example, the Milligan case had come up for decision during the early part of the war instead of in 1866.

The facts in the Milligan case were as follows: Milligan, a civilian, was arrested by order of General Hovey, who commanded the military district of Indiana; was tried in October, 1864, by a military commission which had been established under presidential authority; was found guilty of initiating insurrection and of various other treasonable and disloyal practices; and was sentenced to be hanged on May 19, 1865. This sentence was approved by President Johnson. On May 10, 1865, Milligan sued out a writ of habeas corpus to the United States circuit court in Indiana, alleging the unconstitutional character of the proceedings under which he had been convicted and claiming the right of trial by jury as guaranteed by the Constitution. Unable to agree upon the vital questions of law involved in the case the circuit court certified three questions to the United States Supreme Court for answer. Ought a writ of habeas corpus to issue? Ought the prisoner on the facts presented to be discharged? Had the military commission jurisdiction to try and sentence Milligan? Thus for the first time the Supreme Court faced the question of the right of the President to suspend the writ of habeas corpus and to substitute trial by military authority for trial in the ordinary civil courts in districts outside the actual field of military operations.

The Supreme Court itself found difficulty in agreeing upon this important question. They all held that a military commission set up by the President under such circumstances and without special authority from Congress was unlawful and without any power whatsoever. Five of the judges took the view that neither Congress nor the President had the power to set up military tribunals except in the actual theatre of war where the civil courts were no longer functioning. Four judges, while denying such power to the President, held that it could be exercised by Congress. The court decided, however, that Milligan had been unlawfully convicted and he was released.

The subsequent story of the case is not without interest. Milligan's sentence had been commuted to life imprisonment by the President in June, 1865, and he had been imprisoned by General Hovey in the Ohio penitentiary until his final release on April 10, 1866, as a result of the decision of the Supreme Court. On March 13, 1868, he brought an action of damages against General Hovey for unlawful imprisonment.

The case was tried in the federal circuit court and the jury rendered a verdict for Milligan, but awarded only nominal damages inasmuch as the two-year statute of limitations allowed him to recover damages only for his imprisonment between March 13 and April 10, 1866.

The fact that the decision in the Milligan case set up a powerful judicial protection against military and executive invasion of individual constitutional rights was not sufficient to distract contemporary attention from the vital political consequences of the rule regarding congressional power which was laid down. Congress was in the midst of the important work of reconstruction. The radical leaders of the Republican party were committed to a policy of reconstruction which should keep the southern states under the control of federal military forces until conditions seemed to warrant the adoption of a less drastic policy. But the doctrine of the Milligan case, by condemning military government in peaceful sections where the civil courts were open, was obviously incompatible with any such form of military reconstruction. It looked as though the court was trying to prevent the carrying out of the congressional policy and the decision was received with an outburst of anger by the congressional leaders. There was some talk of impeaching the judges, and Congress went forward with its plans for military government in the south in contemptuous disregard for the decision; and utterances from prominent men were not lacking to the effect that the court would come off loser in any combat over the validity of the reconstruction plan adopted. It is an interesting fact that the constitutionality of these reconstruction acts was never passed upon by the Supreme Court. See the case of Mississippi v. Johnson, (page 125), and particularly the case of Ex parte McCardle, 7 Wallace 506 (1869), in which a case involving this vital question was literally snatched from the court, after it had been argued, by a special statute taking away the court's jurisdiction. It seems probable that the court would have held the military reconstruction program invalid, however; for, acting upon the decision in the Milligan case, the judges in the southern circuits declined to hold court in those states which were being governed by military authority. The refusal of Mr. Chief Justice Chase on this ground to hold court in Virginia prevented the trial of Jefferson Davis for treason and particularly infuriated the congressional leaders.

Mr. Justice Davis delivered the opinion of the court, saying in part:

. . . The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked rebellion, the temper of the times did not

allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation. . . .

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which

the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury"; and in the fourth, fifth, and sixth articles of the amendments. . . .

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and

established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the circuit court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the circuit court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the rebellion who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offenses, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded

aid and comfort to rebels, and incited the people to insurrection," the law said, arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to the various provisions of the federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The Sixth Amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,"—language broad enough to embrace all persons and cases; but the Fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger"; and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states

where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. . . .

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for, and to the exclusion of, the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of, and superior to, the civil power,"—the attempt to do which by the king of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the

world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that, in a great crisis like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their

free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence." . . .

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the circuit court for the district of Indiana, with a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist

the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties? . . .

Mr. Chief Justice Chase, for himself and Mr. Justice Wayne, Mr. Justice Swayne, and Mr. Justice Miller, delivered an opinion in which he differed from the court in several important points, but concurred in the judgment in the case.

MISSISSIPPI v. JOHNSON

4 Wallace 475; 18 L. Ed. 437. 1867.

It would have been surprising indeed if, after the decision in the Milligan case (page 114), an attempt had not been made to bring before the Supreme Court the question of the constitutionality of the military government established by Congress in the southern states. The attempt was boldly made in the form of a bill of equity which the state of Mississippi sought to file to enjoin President Johnson and the general in command of the military district of Mississippi and Arkansas from enforcing the acts of March 2 and March 25, 1867, commonly known as the Reconstruction Acts, upon the ground of their unconstitutionality. There was a good deal of popular criticism of the proceedings, which were looked upon as an effort upon the part of the defeated rebels to recover in the courtroom what they had lost on the battlefield, and the leaders in Congress awaited the decision of the court with a good deal of anxiety in view of the well-founded rumor that at least five members of the court regarded the Reconstruction Acts as unconstitutional.

The court avoided a dangerous clash with Congress, however, by deciding that it had no jurisdiction to control the acts of the President. This rule unquestionably embodies sound law and sound common sense. The court may well have been aided in reaching its conclusions not only by the considerations set forth in the opinion but by the recollection that Chief Justice Marshall had subpoenaed President Jefferson at the time of the trial of Aaron Burr for treason, only to have his subpoena ignored; and that in any actual conflict between a strong-minded chief executive and the court the former occupies a highly strategic position which may well enable him to defy decrees of the latter with impunity. This immunity of the President from judicial control, however, is carefully safe-

guarded in the interests of private rights. It does not extend to any subordinate executive officers. It may be recalled that in the case of Marbury v. Madison it was stated by the court that the Secretary of State could be held subject to mandamus if the case was brought in a court having jurisdiction; and in Kendall v. United States, 12 Peters 524 (1838), the Postmaster General was mandamused to perform a duty imposed upon him by statute. Furthermore, while the President is himself immune from judicial control even with respect to the doing of unlawful acts, no agent or subordinate who attempts to carry out the President's unlawful orders is protected. The court may not punish the chief executive who issues the order but it may punish the underling who obeys the order. In Little v. Barreme, 2 Cranch 170 (1804), a naval commander was held liable in damages for injury to property which he inflicted in carrying out the provisions of a proclamation of President Jefferson's which the Supreme Court held to be in excess of the President's power.

With the failure to get a decision from the court on the validity of the Reconstruction Acts in the case of Mississippi v. Johnson, those interested immediately filed another bill to restrain Secretary of War Stanton and General Grant from enforcing the acts. In this way it was thought that the obstacle of the personal and official immunity of the President could be avoided. The court, however, held that the issues involved were political rather than judicial in character and that the court could not undertake to control the exercise by an executive officer of discretionary power. Georgia v. Stanton, 6 Wallace 50 (1867).

Mr. Chief Justice Chase delivered the opinion of the court, saying in part:

. . . We shall limit our inquiry to the question . . . whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper

cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. . . .

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of states and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular states. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress [the courts?] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if

the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a state.

The motion for leave to file the bill is, therefore, denied.

V. POWERS OF CONGRESS—NATURE AND CONSTRUCTION

THE LEGAL TENDER CASES

KNOX v. LEE. PARKER v. DAVIS

12 Wallace 457; 20 L. Ed. 287. 1871.

During the gloomy days of 1862, with the national credit rapidly ebbing and the national expenses amounting to nearly $2,000,000 daily, Congress passed the Legal Tender Act which authorized the issuance of $150,000,000 in treasury notes and made them legal tender in payment of all private debts and public dues except duties on imports and interest on the public debt. By later laws the amount of the notes was increased to $450,000,000. This action was taken against the protest of many thoughtful and conservative men, and at the very reluctant suggestion of Salmon P. Chase, Secretary of the Treasury, who felt the course was unavoidable.

In spite of grave doubts expressed at the time of its passage as to the constitutionality of this act, it was not until after the close of the war that the Supreme Court passed upon its validity. The question had arisen in 1863 in the case of Roosevelt v. Meyer, 1 Wallace 512, but the court in a decision which it later reversed (see Trebilcock v. Wilson, 12 Wallace 687, 1872) held that it had no jurisdiction. In 1865 the case of Hepburn v. Griswold was appealed from the court of errors of Kentucky. Griswold had sued Mrs. Hepburn for the interest and principal due on a promissory note signed in 1860. She had offered legal tender notes in payment but these had been refused; and thus the issue was squarely joined whether the act of Congress making them legal tender was constitutional. The case was argued before the Supreme Court in 1867, and then, on account of the great public interest in the matter, was reargued at the next term, with the government represented by the Attorney General. Public feeling with regard to the forthcoming decision was tense. Every debtor and creditor in the country was intimately concerned in the outcome. There was a general expectation that the court would sustain the law, since its validity had been passed upon in seventeen state supreme courts and all but two had sustained it. After the arguments had been completed a long delay ensued before the opinion of the Supreme Court was handed down. As a matter of fact, the court was in a very peculiar position. In 1866 Congress had provided that no vacancies on the court should be filled until the number of justices fell to seven (it was then ten, with two vacancies). This was in order to deprive President Johnson of

the opportunity of filling vacancies. There was, therefore, danger of an even division of the justices upon the legal tender question. In April, 1869, Congress increased the court to nine, inasmuch as vacancies would now be filled by President Grant. On December 15, 1869, Mr. Justice Grier sent his resignation to the President to take effect February 1, 1870. There were accordingly two appointments to make to the court. In November, 1869, four of the eight justices had come to agree that the Legal Tender Act was void, and Mr. Justice Grier who had at first regarded the act as valid was finally won over to their position. Had the decision been rendered at once the law would have been invalidated by a vote of five to three. It was originally planned to deliver the opinion on the day before Grier's resignation took effect so that his vote might be counted, but out of courtesy to the minority justices who wished more time for the preparation of their opinions the decision was not handed down until February 7, 1870. Hepburn v. Griswold, 8 Wallace 603. With Grier gone the decision was four to three in a court in which two vacancies existed. The majority opinion, interestingly enough, was written by Chief Justice Chase, who now proceeded to declare unconstitutional the act which, as Secretary of the Treasury, he had urged Congress to pass. He frankly admitted his change of view with regard to the matter, pointing out that the Legal Tender Act, by impairing the obligation of contracts through permitting the payment of debts by a depreciated medium of exchange, violated the spirit of the Constitution, and also involved the exercise by Congress of powers not delegated to it and not reasonably implied from any grants of authority which it enjoyed.

On the day upon which the case of Hepburn v. Griswold was decided President Grant sent to the Senate the names of Messrs. Bradley and Strong to fill the two vacant justiceships on the Supreme Court. The appointments were confirmed in March, and four days later the Attorney General moved in the Supreme Court that two legal tender cases still undisposed of be taken up for argument. This meant that the court should reconsider its recent decision; and by a vote of five to four, with the two new justices helping to form the majority, the court ordered a reargument on the constitutional issue involved in the legal tender legislation. The reargument was held; and on May 1, 1871, less than fifteen months after Hepburn v. Griswold, the Supreme Court reversed its previous decision by a vote of five to four, the five being composed of the three dissenting justices in the earlier case supported by the new justices Bradley and Strong. It is the majority opinion in this case which is printed below.

This whole situation had an ugly look. The charge was boldly made that President Grant had deliberately "packed" the Supreme Court by appointing two men whose views upon the legal tender issue he knew in the expectation that they would proceed as they did to bring about a reversal of the court's decision. So far as any available evidence indicates,

this charge was unfounded and was hotly denied by those involved in the matter. The President seems to have selected the two men later appointed before he could have known the outcome of the case of Hepburn v. Griswold, although the Secretary of the Treasury, George Boutwell, was told what that decision was to be some two weeks before it was made public. It is also true that President Grant could probably not have found two Republicans of Supreme Court calibre who believed the Legal Tender Acts unconstitutional, so that the views held by the two men prove nothing in the way of collusion. Whatever actually occurred, however, there can be no doubt that the action of the court was most unfortunate and for a considerable period of time weakened it in the respect and confidence of the country at large.

Quite apart from the interesting historical setting of this case the decision is intrinsically interesting and important by reason of the extremely liberal doctrine regarding the scope of congressional power adopted by the majority. The suggestion there made and especially emphasized in the concurring opinion of Mr. Justice Bradley that the national government must be presumed to have all the powers usually enjoyed by sovereign governments has been strongly criticized as destructive of the whole theory of delegated national authority. It may be noted that in the case of Juilliard v. Greenman, 110 U. S. 421 (1884), the court held that Congress could constitutionally make its treasury notes legal tender in time of peace as well as in time of war. Here again the power was sustained as one which sovereign governments commonly enjoy. It may be observed that save in the realm of international relations, as in the case of Fong Yue Ting v. United States (page 139), the court has never since suggested that the federal government enjoyed powers implied from the mere fact of its being a sovereign nation.

Mr. Justice Strong delivered the opinion of the court, saying in part:

The controlling questions in these cases are the following: Are the acts of Congress, known as the Legal Tender Acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by

every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. . . . And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. . . .

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the Legal Tender Acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a coordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. . . .

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it . . . The powers conferred upon Congress must be regarded as related to each other, and all means

for a common end. Each is but a part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." . . .

And here it is to be observed it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. . . .

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. . . .

Indeed, the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an

attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. . . .

. . . Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply.

. . . It was at such a time and in such an emergency that the Legal Tender Acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the Legal Tender Acts would, could any one be bold enough to assert that Congress transgressed its powers? . . .

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued and that the necessities of the government might

thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. . . .

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. . . . To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the states the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. . . .

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the

Legal Tender Acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid when applied to contracts made after their passage. The argument assumes two things,—first, that the acts do, in effect, impair the obligation of contracts, and second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true, that, under the acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) . . . But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. . . . Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. . . . We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression

be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. . . .

If, then, the Legal Tender Acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering is the argument pressed upon us that the Legal Tender Acts were prohibited by the spirit of the Fifth Amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . .

We are not aware of anything else which has been advanced in support of the proposition that the Legal Tender Acts were for-

bidden by either the letter or the spirit of the Constitution. If, therefore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in Congress. . . .

Mr. Justice Bradley, concurring, said in part:

. . . The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality.

. . . Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence. . . .

Mr. Chief Justice Chase and Mr. Justice Clifford and Mr. Justice Field each delivered dissenting opinions. Mr. Justice Nelson also dissented.

FONG YUE TING v. UNITED STATES

149 U. S. 698; 37 L. Ed. 905; 13 Sup. Ct. 1016. 1893.

From the very beginning of our constitutional history the courts have given the broadest and most liberal construction to the powers of Congress. Thus Congress has been held to enjoy not only those powers expressly delegated to it by the Constitution but such further authority as may reasonably be implied from those specific grants, with the term "reasonably" most generously interpreted. This doctrine has been seen to be even older than the decision in McCulloch v. Maryland (page 7). Congress derives power also from the grants of authority to the other departments of the government, as has been seen in the case of Missouri v. Holland (page 144). A still further group of cases sustains the implication of power in Congress not from any one of the powers specifically delegated by the Constitution but from any combination of such powers taken together. Thus the power to condemn by eminent domain the land

for the national cemetery at Gettysburg, United States v. Gettysburg Electric Ry. Co., 160 U. S. 668 (1896), was sustained upon the theory that it could be implied thus from a group of federal powers combined. This has sometimes been called the theory of "resulting powers." Finally, the court has boldly asserted that Congress enjoys certain powers not expressly delegated to it, not even reasonably inferable from any one or any group of such powers, solely upon the ground that the United States in its relations with other nations is a sovereign nation and must be held to possess with respect to foreign relations all the powers that other sovereign nations enjoy. To admit that Congress is endowed in general with all legislative authority commonly enjoyed by the legislatures of other sovereign powers would, of course, break down entirely the doctrine that the powers of that body are delegated powers. But the theory has not been applied generally. It has been confined, with one striking exception (see the much criticized doctrine of federal power in the Legal Tender Cases, already discussed (page 130), to the exercise of power by Congress in the realm of foreign and international relations to sustain legislation of genuine international importance, such as the right to punish the counterfeiting in this country of foreign securities, to annex unoccupied territory, to set up judicial tribunals in foreign countries, to lease and administer foreign territory, to exclude or regulate the admission of aliens. Perhaps the most striking case sustaining the theory is the case of Fong Yue Ting v. United States upholding the power of Congress to exclude or deport aliens.

Fong Yue Ting was born in China and came to the United States prior to 1879, during a period when the United States and China had a treaty according the rights of domicile in this country to Chinamen. In 1892 Congress passed a statute prohibiting further Chinese immigration and providing that all Chinese laborers who were entitled to remain in the country should apply to the proper authorities for a certificate of residence; if they failed to do this they were to be deemed unlawfully in the country and deported. Fong Yue Ting's failure to comply with the statute resulted in deportation proceedings against him, and in resisting such action he set up the unconstitutionality of the statute. The opinion of the court sustaining the act is one of the clearest expositions of the doctrine of the sovereign authority of Congress with respect to international affairs. The theory as laid down forms the constitutional basis of all our immigration legislation not resting upon treaty provisions. Three justices dissented vigorously in this case and the rule has not escaped subsequent criticism, but it remains firmly established.

Mr. Justice Gray delivered the opinion of the court, saying in part:

. . . The right of a nation to expel or deport foreigners, who have

not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in Chae Chan Ping's case. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, section 206; 130 U. S., 607. . . .

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of

the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several states are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another state, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government. . . .

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene. . . .

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides. . . .

In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. . . .

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there; and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. . . .

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest. . . .

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject. . . .

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of this court, is that in each of

these cases the judgment of the circuit court, dismissing the writ of habeas corpus, is right and must be affirmed.

Mr. Chief Justice Fuller, Mr. Justice Brewer, and Mr. Justice Field each rendered dissenting opinions.

MISSOURI v. HOLLAND

252 U. S. 416; 64 L. Ed. 641; 40 Sup. Ct. 382. 1920.

In discussing the implied powers of Congress it is important to bear in mind that they may be derived not merely from the specific grants of power to Congress but also from the clause of the Constitution which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, *and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.*" Among these "other powers" vested in the departments or officers of the government perhaps the most conspicuous is the treaty-making power, which resides in the President and Senate. Thus Congress may derive legislative authority from the power to carry out the provisions of a treaty when it could not derive it from any of the specific grants of legislative power enumerated in article 1. This point is clearly emphasized by the judicial history of the two migratory bird acts passed by Congress.

In 1913 Congress passed an act forbidding save under strict regulations the killing of migratory birds. Now the control of bird life is not one of the powers which the Constitution grants to Congress, nor is it easy to see how it could reasonably be implied from any of the powers which are granted, although an attempt was made to base it on the commerce clause. The Supreme Court never passed upon the validity of this law, but it came before two lower federal courts and was declared unconstitutional in each; United States v. Shauver, 214 Fed. 154 (1914); United States v. McCullagh, 221 Fed. 288 (1915). These cases have been generally regarded as correct.

In 1916 we entered into a treaty with Great Britain by the terms of which the United States and Canada agreed to protect migratory birds, and to recommend to their respective legislative bodies the enactment of appropriate legislation for that purpose. In 1918 Congress passed such a law, much more elaborate than the act of 1913, forbidding the killing, capturing, or selling of the birds included within the provisions of the treaty except in accordance with regulations set by the Secretary of Agriculture. The Secretary of Agriculture promulgated suitable regulations and the state of Missouri, on the ground that her reserved powers were invaded by

the act, brought action to enjoin a game warden of the United States from enforcing the provisions of the act and the rules established by the Secretary of Agriculture. The decision of the court makes it clear that Congress may regulate bird life as a means of carrying into effect the provisions of a treaty when it could not regulate it as an independent exercise of legislative power.

Mr. Justice Holmes delivered the opinion of the court, saying in part:

. . . as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by article 2, section 2, the power to make treaties is delegated expressly, and by article 6, treaties made under the authority of the United States, along with the Constitution and laws of the United States, made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid, there can be no dispute about the validity of the statute under article 1, section 8, as a necessary and proper means to execute the powers of the government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the states had been held bad in the district court. United States v. Shauver, 214 Fed. 154; United States v. McCullagh, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U. S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress

are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . . We are not yet discussing the particular case before us, but only are considering the validity of the test proposed. With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds,—an assertion that is embodied in statute. No doubt it is true that, as between a state and its inhabitants, the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another state, and in a week a thousand miles away. If we are to be accurate, we cannot put the case of the

state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that, but for the treaty, the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states, and as many of them deal with matters which, in the silence of such laws, the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties, of course, "are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." . . . No doubt the great body of private relations usually fall within the control of the state, but a treaty may override its power. . . .

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld. . . .

Mr. Justice Van Devanter and Mr. Justice Pitney dissent.

SELECTIVE DRAFT LAW CASES

ARVER v. UNITED STATES

245 U. S. 366; 62 L. Ed. 349; 38 Sup. Ct. 159. 1918.

On May 18, 1917, Congress passed the Selective Draft Act. This statute provided that all male citizens between the ages of 21 and 30 should be subject to national military service, authorized the President to select an army of a million men should it be necessary to do so, and provided for elaborate administrative machinery for the enforcement of the act. Certain classes were exempt from the provisions of the law, such as state and federal officers, ministers of religion, and theological students. Members of religious sects whose tenets excluded the moral right to en-

gage in war were relieved of military duty in the strict sense but were held subject to noncombatant service as defined by the President. Persons liable to service under the act were required to present themselves at a specified time for registration. Arver and others failed to register and were convicted under the penal sections of the law. They appealed to the Supreme Court on the ground that Congress was without power to establish compulsory military service. As was expected the court sustained the validity of the law by a unanimous decision. The opinion is of value not because the important issue involved was particularly controversial but because it establishes authoritatively, as against somewhat frivolous objections, the constitutionality of military conscription.

Mr. Chief Justice White delivered the opinion of the court, saying in part:

. . . The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article 1, section 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, section 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article 6. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several states. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military

duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractedly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, book III, cc. 1 and 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force. In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, book I, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.

In the colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the government contains a list of Colonial Acts manifesting the power and its enforcement in

more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army, each state being bound for its quota as called. But it is indisputable that the states in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania constitution of 1776:

"That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Article 8. . . .

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, section 10. . . .

[The court then distinguishes between the constitutional provisions regarding the militia and the power of Congress to raise armies.]

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the government under the Confederation to the United States under the Constitution (act of September 29, 1789) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every state (act of May 8, 1792) which was never carried into effect,

Congress confined itself to providing for the organization of a specified number distributed among the states according to their quota to be trained as directed by Congress and to be called by the President as need might require. When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border, the government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the states in accordance with the previous acts of Congress. (Proclamation of April 15, 1861.) That force being

inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. (Act of July 22, 1861.) This was soon followed by another act increasing the force of the militia to be organized by the states for the purpose of being drawn upon when trained under the direction of Congress (act of July 29, 1861), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the act of March 3, 1863, was adopted entitled "An act for enrolling and calling out the national forces and for other purposes." By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of 20 and 45 was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men. It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. . . .

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the states under the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have

been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. (Kneedler v. Lane, 45 Pa. St. 238.) And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding states wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. . . .

In reviewing the subject we have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features is too wanting in merit to require further notice. Second, we think that the contention that the statute is void be-

cause vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. . . . A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. . . . And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.

VI. THE JUDICIARY

MARBURY v. MADISON

1 Cranch 137; 2 L. Ed. 60. 1803.

Although the election in the autumn of 1800, brought to the Federalist party a defeat which they never retrieved, President Adams and his Federalist associates did not retire from office until March, 1801. While the Federalists had been for some time considering plans to reform the federal courts by remodeling the Judiciary Act of 1789, yet now in the eleventh hour they boldly set themselves to the task with renewed energy in order to make sure that the needed changes should be made by themselves rather than by the triumphant incoming Republicans and in order, undoubtedly, to insure a fortress for Federalist principles not easily to be broken down. Accordingly they passed the Judiciary Act of February 13, 1801, which relieved the Supreme Court justices of circuit court duty, increased the number of circuit court judges, and created a considerable number of minor judicial positions. President Adams proceeded during the last sixteen days of his administration to fill these newly created vacancies, sixty-seven in all, with loyal Federalists, and the task of signing their commissions occupied him until well into the night before the inauguration of Jefferson.

The federal courts had already incurred the bitter animosity of the Jeffersonian party, largely because of the vigor with which they had enforced the obnoxious Alien and Sedition Acts of 1798; and the Republicans were enraged beyond measure at what they deemed the effrontery of the Federalists in enacting the statute just mentioned. The judiciary was caustically referred to by Randolph as a "hospital for decayed politicians" while Jefferson wrote to a friend, "The Federalists have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased." One of the first Republican efforts, therefore, was to repeal the Judiciary Act of 1801, and after a long and acrimonious debate this was accomplished, March 8, 1802. This repealing act restored the Supreme Court judges to circuit court duty and abolished the new judgeships which had been created. The Federalists in Congress had bitterly assailed the repealing statute as unconstitutional, and Marshall himself always adhered to that view and probably would have held the law void if it had come before him in his judicial capacity. In order to prevent this, however, the repealing act

had so altered the sessions of the Supreme Court that it did not convene again for fourteen months, by which time acquiescense in the act by the judges affected made an attack upon its validity impracticable.

However, when the court convened in February, 1803, the case of Marbury v. Madison was on the docket. Marbury was one of those whom President Adams had appointed to a justiceship of the peace in the District of Columbia under the Judiciary Act of 1801, and whose commission, signed and sealed on March 3, had not been delivered when Jefferson, with Madison as his Secretary of State, had taken office on March 4. Needless to say the commission was not delivered by the two Republican statesmen, and Marbury filed a suit asking the Supreme Court in the exercise of its original jurisdiction to issue a writ of mandamus to compel Madison to deliver the commission. The right to issue such a writ had been conferred upon the court by a provision of the Judiciary Act of 1789 and jurisdiction thereunder had been exercised by the court twice before Marshall's accession to the bench. When the case came on for argument it assumed very largely the aspect of a quarrel between the President and judiciary. Marbury's own interest in it was small, since it was fairly clear that Jefferson had no intention of giving him his commission even if the court ordered it to be given. The Republicans seem to have expected that the court would issue the mandamus asked for and there were open threats that Marshall would be impeached if that occurred.

The decision in Marbury v. Madison was therefore received with some astonishment, for while Marshall held that the case was one in which a writ of mandamus afforded a proper remedy and took occasion to scold the Republican administration for not having delivered the commission, he went on to hold that the section of the Judiciary Act of 1789 purporting to add to the original jurisdiction of the Supreme Court the power to issue such a writ exceeded the power of Congress under the Constitution. This being the case he announced that it became the duty of the court to declare the section in question void. Thus was established the great doctrine of judicial review, or the power of the Supreme Court to declare acts of Congress unconstitutional.

It is worth noting that this important doctrine was by no means an innovation. Most of the arguments which Marshall uses in his famous opinion had been presented again and again in the debates in Congress on the Repeal Act of 1802. Moreover, the power of invalidating legislation had been exercised by the lower federal courts without opposition, and there seems to be evidence that public opinion looked upon the practice as one of the normal incidents of judicial power. The decision itself seems not to have been criticized at the moment because of its enunciation of this important doctrine but rather because Marshall had held that a cabinet officer was subject to control by mandamus if issued by a court having jurisdiction. It was only as the doctrine of judicial review came

eventually to appear to the Republicans as a menace to their party program that they opposed it.

The case of Marbury v. Madison has a certain strategic significance which should not be left out of account. The next case in which an act of Congress was invalidated by the Supreme Court was the famous Dred Scott case decided in 1857. By that time nearly seventy years had elapsed from the time of the formation of our constitutional system and the court was composed of men holding far less strongly nationalistic views than those of Marshall and his associates. If the power of judicial review had not been exercised and the doctrine established in the case of Marbury v. Madison, one may well conjecture whether our constitutional development would have been the same.

The portion of Marshall's opinion here printed deals only with the question of the power of the court to invalidate an act of Congress.

. . . The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose

is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding

the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles ex-

ported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as—, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn

mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

EAKIN v. RAUB

12 Sergeant and Rawle (Pennsylvania Supreme Court) 330. 1825.

The power of the Supreme Court to declare acts of Congress unconstitutional has so long been an integral part of our constitutional system, and Marshall's reasoning in the case of Marbury v. Madison (page 155) is so impressive, that it is easy to lose sight of the fact that a most cogent argument may be made against the establishment of the power, and that had the Supreme Court never enjoyed it no very calamitous results would have ensued. Jefferson, Marshall's most bitter personal and political adversary, never admitted the paramount authority of the Supreme Court to determine the validity of an act of Congress, but held that each of the three departments of the national government being equal and separate was equally empowered "to decide on the validity of an act according to its own judgment and uncontrolled by the opinions of any other department." This view was shared by many other thoughtful men of the day. In the exercise of its power of judicial review the court will not pass upon what it terms "political questions" (see Luther v. Borden, p. 166, questions the final determination of which has been confided by the Constitution to the discretion of the political departments, that is, the legislature or the executive. According to the view of Jefferson and his followers all questions involving the constitutionality of acts of Congress which might come before the court would be "political questions." The statute might conflict with the Constitution, but that fact would not of itself endow the court with any power to invalidate it; rather it would be the duty of the court to enforce the statute without questioning its validity. That such a system would not have been followed by any strikingly

disastrous results may be inferred from the fact that in most of the constitutional governments of the world the courts do not enjoy the power of judicial review; that in this country only fifty-three statutes of Congress have been held unconstitutional (through the 1923 term of the court), of which only a very few involved problems of any vital or lasting importance; and that even one of the members of the Supreme Court itself, Mr. Justice Holmes, has declared, "The United States would not come to an end if we lost our power to declare an Act of Congress void." It may be suggested by way of caution, however, that the power to declare an act of Congress invalid is a very much less important power of the Supreme Court than the power to pass upon the validity of state legislation. This last authority may well be regarded as vital to the preservation of our federal system by providing a necessary method of preventing the state governments from encroaching upon the domain of federal authority or impairing the federal rights and immunities of the individual.

Perhaps the most lucid and carefully reasoned answer to Marshall's argument in Marbury v. Madison is to be found in the following excerpt from a dissenting opinion written by Mr. Justice Gibson of the supreme court of Pennsylvania in 1825. The case itself is of no intrinsic interest or importance, but it raised the question of the power of the state supreme court to invalidate a statute, and Judge Gibson took occasion to express his views upon this point although a majority of his brethren did not agree with him. It is interesting to note that twenty years later a lawyer in pleading his case cited to the court this opinion, whereupon Judge Gibson replied to the lawyer: "I have changed that opinion, for two reasons. The late convention [which had framed the Pennsylvania constitution of 1838], by their silence, sanctioned the pretensions of the courts to deal freely with the Acts of the Legislature; and from experience of the necessity of the case" (Norris v. Clymer, 2 Pa. St. 277, 281, 1845).

. . . I am aware, that a right to declare all unconstitutional acts void, without distinction as to either constitution, is generally held as a professional dogma; but, I apprehend, rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination, and I shall therefore state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained. But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall (in Marbury v. Madison, 1 Cranch, 176), and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may

fairly be set down to the weakness of the position which he attempts to defend. . . .

The Constitution and the right of the legislature to pass the act, may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the Constitution are we to look for this proud preëminence? Viewing the matter in the opposite direction, what would be thought of an act of assembly in which it should be declared that the Supreme Court had, in a particular case, put a wrong construction on the Constitution of the United States, and that the judgment should therefore be reversed? It would doubtless be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void which has been enacted according to the forms prescribed in the Constitution, is not a usurpation of legislative power. It is an act of sovereignty; and sovereignty and legislative power are said by Sir William Blackstone to be convertible terms. It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the Constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved. And, that a very cogent argument may be made in this way, I am not disposed to deny; for no conclusions are so strong as those that are drawn from the petitio principii.

But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the Constitution. It does so: but how far? If the judiciary will inquire into anything besides the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature. . . .

Everyone knows how seldom men think exactly alike on ordinary subjects; and a government constructed on the principle of assent by all its parts, would be inadequate to the most simple operations. The notion of a complication of counter checks has been carried to an extent in theory, of which the framers of the Constitution never dreamt. When the entire sovereignty was separated into its elementary parts, and distributed to the appropriate branches, all

things incident to the exercise of its powers were committed to each branch exclusively. The negative which each part of the legislature may exercise, in regard to the acts of the other, was thought sufficient to prevent material infractions of the restraints which were put on the power of the whole; for, had it been intended to interpose the judiciary as an additional barrier, the matter would surely not have been left in doubt. The judges would not have been left to stand on the insecure and ever shifting ground of public opinion as to constructive powers; they would have been placed on the impregnable ground of an express grant. . . .

But the judges are sworn to support the Constitution, and are they not bound by it as the law of the land? In some respects they are. In the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute its provisions, they are bound by it in preference to any act of assembly to the contrary. In such cases, the Constitution is a rule to the courts. But what I have in view in this inquiry, is the supposed right of the judiciary to interfere, in cases where the Constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, only as far as that may be involved in his official duty; and, consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. It is worthy of remark here, that the foundation of every argument in favor of the right of the judiciary, is found at last to be an assumption of the whole ground in dispute. Granting that the object of the oath is to secure a support of the Constitution in the discharge of official duty, its terms may be satisfied by restraining it to official duty in the exercise of the ordinary judicial powers. Thus, the Constitution may furnish a rule of construction,

where a particular interpretation of a law would conflict with some constitutional principle; and such interpretation, where it may, is always to be avoided. But the oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest: for instance, to prevent the House of Representatives from erecting itself into a court of judicature, or the Supreme Court from attempting to control the legislature; and, in this view, the oath furnishes an argument equally plausible against the right of the judiciary. But if it require a support of the Constitution in anything beside official duty, it is in fact an oath of allegiance to a particular form of government; and, considered as such, it is not easy to see why it should not be taken by the citizens at large, as well as by the officers of the government. It has never been thought that an officer is under greater restraint as to measures which have for their avowed end a total change of the Constitution, than a citizen who has taken no oath at all. The official oath, then, relates only to the official conduct of the officer, and does not prove that he ought to stray from the path of his ordinary business to search for violations of duty in the business of others; nor does it, as supposed, define the powers of the officer.

But do not the judges do a positive act in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the Constitution which may be the consequence of the enactment. The fault is imputable to the legislature, and on it the responsibility exclusively rests. In this respect, the judges are in the predicament of jurors who are bound to serve in capital cases, although unable, under any circumstances, to reconcile it to their duty to deprive a human being of life. To one of these, who applied to be discharged from the panel, I once heard it remarked, by an eminent and humane judge: "You do not deprive a prisoner of life by finding him guilty of a capital crime; you but pronounce his case to be within the law, and it is therefore those who declare the law, and not you, who deprive him of life."

LUTHER v. BORDEN

7 Howard 1; 12 L. Ed. 581. 1849.

Not all questions which arise under the Constitution of the United States are questions which the Supreme Court will undertake to answer. Very early in the exercise of its power of judicial review the court pointed out that certain powers are vested in the legislative or executive departments of the government to be exercised in a purely discretionary manner, and that whether they have been constitutionally exercised or not is a "political question" which the court will not undertake to answer. One of the early and very striking instances of this type of question was that which was raised in the famous case of Luther v. Borden.

This case arose out of the following facts: The original constitution of Rhode Island, which was merely the colonial charter with a few minor adaptations, provided for a very restricted suffrage based upon the possession of property; and the right to vote continued to be thus limited long after universal manhood suffrage had been rather generally adopted throughout the country. Many efforts were made to have the constitution amended so as to put the franchise upon a more democratic basis, but all such attempts were defeated by the relatively small group of legal voters. In 1841 the popular feeling regarding the situation ran even higher than before; mass meetings were held throughout the state, and without any semblance of constitutional sanction the citizens were directed to choose by universal manhood suffrage delegates to a constitutional convention. The convention thus formed duly met and drafted a new state constitution which established adult manhood suffrage and made many other changes. A popular referendum was conducted in which all the adult male citizens of the state were permitted to vote, and the new constitution was approved by a majority of the votes cast. The leader of the whole movement was a young lawyer, Thomas W. Dorr, who was elected governor under the new constitution and immediately attempted to put the new government into operation. The regular charter government of course did not recognize the validity of any of these acts. It called out the state militia and declared martial law and finally appealed to President Tyler to send federal troops to aid in putting down the insurrection. The President took steps to comply with this request and the "Dorr Rebellion" collapsed. Dorr himself was captured, tried for treason, and finally sentenced to life imprisonment. He was later pardoned. He naturally had managed to arouse a good deal of sympathy for his cause outside the state, particularly amongst the Democrats, and it was felt that it would be desirable to present to the Supreme Court of the United States the question of the legality of the new constitution and the acts done under it. This was tried first by Dorr himself by attempting to sue out a writ of

habeas corpus in the Supreme Court, but that tribunal dismissed the petition for want of jurisdiction, see Ex parte Dorr, 3 Howard 103 (1845). Upon the assumption that the same issue could be raised collaterally the civil controversy between Luther and Borden, relatively unimportant in itself, was pushed through to the Supreme Court. Luther had been a supporter of the Dorr movement, and in an effort to arrest him, Borden and others who were enrolled as members of the militia under the charter government broke into Luther's house. This act they justified upon the ground that martial law had been declared and that they were acting under the orders of their superior officers. Luther, however, sued Borden for trespass, claiming that the act of the legislature establishing martial law was void inasmuch as the Dorr government, elected by the people of the state, was the lawful government. (It should be noted that in January, 1842, the charter government had called a constitutional convention and drafted a new constitution which was ratified by the people in due form and went into effect in 1843. Thus the Dorr movement did not entirely fail in its purposes.)

By the facts as presented in this case, the court was invited to decide which of the two governments struggling for supremacy in Rhode Island in the year 1842 was the lawful one. But this question, replied the Supreme Court, was a "political question." The President in exercising the power conferred on him by Congress to send federal troops to aid states in suppressing insurrection had indicated that he regarded the charter government as the lawful government, and this decision was binding upon the court. The court intimated that Congress itself would also share the power of deciding between the competing governments by deciding which group of rival senators and representatives it would seat in Congress, but it was not asked to make such a decision. The court declined to decide whether Rhode Island had a republican form of government within the meaning of the guaranty in the United States Constitution, article 4, section 4, but held that the enforcement of that guaranty was confided to the political departments of the government.

There are, of course, numerous other questions which have been held by the courts to be "political" in character. Such is the question whether there is a sufficient emergency to justify the President, acting under the authority of an act of Congress, in calling out the militia to repel invasion or to put down insurrection (see Martin v. Mott, 12 Wheaton 19; 1827). Such also are many of the questions which arise for determination in the course of the conduct of foreign relations; as, for instance, the recognition of a foreign government, the acquisition of territory, the determination of boundaries, the existence or termination of a treaty, and the like. The early case of Foster v. Neilson, 2 Peters 253 (1829), raising the question as to the title to certain territory which was the subject of international dispute, emphasized the unwillingness of the court to attempt to

settle this type of question. The question whether or not a state of the Union has a republican form of government within the meaning of that clause of the Constitution guaranteeing such form of government was squarely raised in 1912 in the case of Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118. In 1902 Oregon had amended her state constitution so as to establish the initiative and referendum. In 1906 a law was proposed by popular initiative and duly enacted by the people which imposed certain taxes on corporations. The plaintiff corporation resisted the payment of the tax on the ground that the incorporation of the initiative and referendum into the constitutional system of the state destroyed the republican character of its government and thus robbed it of lawful authority. The argument was that republican government means representative government and that representative government is destroyed by the system of direct legislation. The Supreme Court refused to pass on the question whether Oregon had a republican form of government or not, and pointed out that that question was political in character and had been determined by Congress in admitting Senators and Representatives of the state to their seats in Congress.

Mr. Chief Justice Taney delivered the opinion of the court, saying in part:

. . . The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the Senators and Representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided that, "in case of any insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the legislature cannot be convened) to call forth such number of militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts

when the conflict is raging, if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the state, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign states of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws

of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

. . . Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the state, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every state resides in the people of the state, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the circuit court must, therefore, be affirmed.

UNITED STATES v. LEE

106 U. S. 196; 27 L. Ed. 171; 1 Sup. Ct. 240. 1882.

It is a well established principle of public law that a sovereign is free from suit in his own courts. He can consent to be sued if he wishes, but the consent is given as an act of grace and may be withdrawn at any time. This doctrine applies both to the national and state governments, with the consequence that an aggrieved citizen is able to sue the govern-

ment only in case it makes special provision for his doing so. Congress has established a court of claims in which alleged infringement by the federal government of contract rights may be adjudicated; but even so the successful claimant against the government must depend upon Congress to appropriate sufficient funds to satisfy the claims which the court finds well grounded. But while this immunity of the government from suit may be desirable and necessary, it is vitally important, if private rights are to be given adequate protection, that it shall not extend to the officer or agent of the government who misuses his official position or acts beyond the limits of his authority. This the courts have recognized; and they have shown an entire unwillingness to allow the government under the cover of its immunity from suit to continue in the enjoyment of benefits derived from the unlawful acts of its officers, even though the officers may have acted in good faith. In no case is this more forcefully demonstrated than in the case of United States v. Lee, which established a strong bulwark for the protection of private rights against governmental aggression.

During the Civil War certain taxes levied by the United States government upon the Arlington estate near Washington owned by the wife of General Robert E. Lee became delinquent, and federal tax collectors seized the property and offered it for public sale. The United States government wished to acquire the property for use as a national cemetery and military post, and an army officer was sent to the sale to bid it in for the government. Simultaneously, however, there appeared a friend of the Lee family who made an offer, as the law allowed, to pay the taxes on behalf of owner. The officer in charge of the sale, acting under a rule set up by the tax commissioners, rejected the offer. The property passed into the hands of the government; part of it was used as a military post and part of it as a cemetery. Mrs. Lee herself made no effort to recover the estate, but after her death, and after the United States government had been in possession some ten years, her son brought an action in ejectment against the commandant of the military post, Fort Myers, and against the superintendent of the Arlington Cemetery, claiming that they were in possession as trespassers and seeking to recover the property for himself. The United States government intervened, through the Attorney General, alleging that the suit was actually against the government itself and could not be maintained. At the first argument only eight justices of the Supreme Court were present and they divided evenly upon the question whether the suit was against the government. A rehearing before a full bench resulted in a five-to-four decision that the court could take jurisdiction and that the government was in unlawful possession of the property. The matter was finally adjusted in such a manner that the government retained the property but made compensation to the Lee heirs.

Mr. Justice Miller, in delivering the opinion of the court, said in part:

. . . We have then two questions presented to the court and jury below, and the same questions arise in this court on the record: (1) Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in plaintiff? (2) If such an action could be maintained, was the prima facie title of the plaintiff divested by the tax sale and the certificate given by the commissioners? It is believed that no division of opinion exists among the members of this court on the proposition that the rulings of law under which the latter question was submitted by the court to the jury was sound, and that the jury were authorized to find, as they evidently did find, that the tax certificate and the sale which it recited did not divest the plaintiff of his title to the property. . . .

The counsel for plaintiffs in error, and in behalf of the United States, assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses. This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government. The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; . . .

What were the reasons which forbid that the king should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. No such reason exists in our government, as process runs in the name of the President and may be served on the Attorney General, as was done in Chisholm v. State of Georgia, 2 Dallas 419. Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment. . . .

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government. It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. . . .

The objection [against allowing the suit to be maintained] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the Constitution of the United States, whose language is: "That no person . . . shall be de-

prived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. Ex parte Milligan, 4 Wallace 2. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it, for the argument is that the formal suggestion of the existence of such authority

forbids any inquiry into the truth of the suggestion. But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court—a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration. What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff—a right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. . . .

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more

strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, "Stop, here; I hold by order of the President, and the progress of justice must be stayed." That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations. One of these, of no little significance, is that during the existence of the government for now nearly a century under the present

Constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars so serious as to call into exercise all the powers and all the resources of the government have been conducted to a successful issue. One of these was a great civil war, such as the world has seldom known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens in order to cripple the exercise of the authority necessary to put down the rebellion, yet no improper interference with the exercise of that authority was permitted or attempted by the courts. . . .

Another consideration is that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of Carr v. U. S., already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the state courts, the answer is that no case can arise in a state court where the interests, the property, the rights, or the authority of the federal government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in

courts which are the creation of the federal government. The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands. While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all. Dependent as its courts are for the enforcement of their judgments upon officers appointed by the Executive, and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rests solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guarantied by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority.

The circuit court was competent to decide the issues in this case before the parties that were before it. In the principles on which these issues were decided no error has been found, and its judgment is affirmed.

Mr. Justice Gray, with whom concurred Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Woods, dissented.

IN RE DEBS

158 U. S. 564; 39 L. Ed. 1092; 15 Sup. Ct. 900. 1895.

This case arose out of the famous Pullman strike of 1894. In May of that year the employees of the Pullman Palace Car Company struck to secure the restoration of the wage rate of the year before, which had been lowered as a result of the business depression. Two months earlier the Pullman employees had joined the American Railway Union and when the union met in Chicago for its annual convention in June, 1894, it voted that its members should stop handling Pullman cars unless the Pullman company would consent to arbitration. Thus a merely local wage dispute grew into a nation-wide railroad strike of a purely sympathetic character. The union found itself pitted against the General Manager's Association, which represented twenty-four roads passing into or through Chicago all of them bound by contracts to carry Pullman cars. The strike

was carried on with much violence, and losses to property and business were estimated at nearly $80,000,000. Upon the petition of the United States District Attorney, the federal circuit court enjoined Eugene V. Debs, President of the American Railway Union, and others, from combining or conspiring to obstruct the rails, tracks, engines, and trains of certain railways engaged in interstate commerce and in carrying the United States mails or from compelling, or by threats inducing, railway employees to strike. Debs continued his activities in the strike and was thereupon sentenced to six months imprisonment for contempt of court. Debs sued out a writ of habeas corpus in the Supreme Court of the United States, alleging the want of constitutional authority in the court to issue the injunction or to impose the punishment.

This was the first conspicuous case involving the use of the injunction in a labor dispute, and it attracted wide attention. The power to issue the injunction was sustained by the Supreme Court on the broad and general ground that the court could use its jurisdiction in equity to prevent interference with interstate commerce or the mails without waiting for a statute especially authorizing such procedure or especially penalizing the acts of obstruction. The lower court had sustained the injunction under the provisions of the Sherman Anti-Trust Act forbidding restraints of trade and commerce; but the Supreme Court preferred to rest its decision upon the broad principle of the reasonably implied power of the judicial department to lend its aid in warding off interference with federal functions and interests.

Mr. Justice Brewer delivered the opinion of the court, saying in part:

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They

are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state.

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice Marshall in McCulloch v. Maryland, 4 Wheaton 316, 405, 424.

"Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directing upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states." Chief Justice Chase in Lane County v. Oregon, 7 Wallace 71, 76.

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at

the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.'" Mr. Justice Bradley in Ex parte Siebold, 100 U. S. 371, 395.

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a postoffice system for the nation. [Here the court discusses the statutes passed in the exercise of these powers.]

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the federal Constitution it is provided:

"The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed." If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the

soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. . . .

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. . . .

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been

recognized as one of the powers and duties of a government to remove obstructions from the highway under its control.

As said in Gilman v. Philadelphia, 3 Wallace 713, 724: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament in England." . . .

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. . . .

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme

importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of these courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the circuit court had power to issue its process of injunction; that it having been issued and served on these defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power "to punish by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process,

order, rule, decree or command," and enter the order of punishment complained of; and, finally, that, the circuit court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus in this or any other court. . . .

The petition for a writ of habeas corpus is denied.

NEW HAMPSHIRE v. LOUISIANA

108 U. S. 76; 27 L. Ed. 656; 2 Sup. Ct. 176. 1883.

When the Constitution was before the states for ratification its opponents raised the objection that the clause which provided that the judicial power of the United States should extend to controversies "between a State and citizens of another State" (article 3, section 2) would subject the states to suits brought by individual creditors and others who might feel that they had grievances. This idea was particularly obnoxious because the states had neither the intention nor the desire to repay money which was owing to loyalists or British subjects nor to restore the property which had been confiscated during the war. That the clause in question would authorize suits by citizens against the states was denied by Hamilton in the Federalist (No. 81) and was also vigorously repudiated by Madison and Marshall in the Virginia ratifying convention of 1788 (Elliot's Debates, 2d Ed. III, 533, 555). That the fears which had been aroused were not ill-founded, however, was evidenced by the fact that within two years after the organization of the Supreme Court four cases were instituted before that tribunal against states of the Union by individuals. The first case which came on for decision was that of Chisholm v. Georgia, 2 Dallas 419 (1793), which involved a suit brought by Chisholm and another, citizens of South Carolina, as executors of an English creditor of the state of Georgia. Georgia hotly declined to appear to defend the suit, denying the jurisdiction of the Supreme Court to entertain such an action. The court, however, to the general surprise held that the suit was properly brought and that a state could be sued in the Supreme Court by an individual. Construing the clause of the judiciary article above quoted the court observed that surely a controversy between A and B was also a controversy between B and A and under the wording of the clause it had no choice but to assume jurisdiction. Since the state of Georgia still refused to appear as a defendant a judgment by default was entered against the state.

The decision aroused immediate and bitter opposition. The lower house of the Georgia legislature passed a bill to punish by hanging any person who should attempt to aid in enforcing the decree of the court.

Other states also protested, for upon the authority of the court's decision suits were soon instituted against several other states. Within two days of the handing down of the decision in Chisholm v. Georgia a constitutional amendment was introduced into Congress depriving the federal courts of all jurisdiction in cases brought against a state by the citizens of other states or of any foreign country. This was ratified in 1798 and became the Eleventh Amendment. In Hans v. Louisiana, 134 U. S. 1 (1890), the Supreme Court held that a state could not be sued by one of its own citizens.

The adoption of the Eleventh Amendment not only "recalled" the Supreme Court's decision in Chisholm v. Georgia, but it made it possible for any state of the Union, with perfect impunity so far as judicial interference is concerned, to repudiate its debts to individuals. And there have been a number of instances in which states have availed themselves of this dubious right. One or two of these cases have given the Supreme Court the opportunity to indicate the real force and significance of the Eleventh Amendment.

In the case of New Hampshire v. Louisiana (combined with New York v. Louisiana) the two plaintiff states sought by appropriate bills in equity to compel the state of Louisiana to pay the interest on certain of its bonds; bonds which had been assigned by their owners to the states of New Hampshire and New York for collection. Under acts in New Hampshire in 1879 and in New York in 1880 any citizen of the state holding a valid claim against any other state of the Union, which claim was past due and unpaid, might assign in writing the claim in question to the state, the attorney general being thereupon authorized to bring suit against the defaulting state upon the bonds or claims and carry the case through to final judgment. The money thus recovered was then to be paid to the assignors after the expenses of the litigation had been deducted. In short, the state merely served as a collecting agency for the individual creditors. It was an attempt to defeat the purpose of the Eleventh Amendment by allowing the state to sue the defaulting state inasmuch as the individual creditor could not himself seek relief in court. It was upon the ground that the plan violated the spirit and purpose of the Eleventh Amendment that the Supreme Court dismissed these suits.

An interesting sequel to this case is that of South Dakota v. North Carolina, 192 U. S. 286, decided in 1904. In 1867 North Carolina had issued bonds to complete a railroad within the state, these bonds secured by mortgages of equivalent amounts on the stock owned by the state in another railway corporation. These bonds matured in 1897 and a substantial number of them remained unpaid. In 1901 ten of these were presented to the state of South Dakota as a gift by their owners. South Dakota thereupon brought suit in the Supreme Court against North Carolina, asking that North Carolina be required to pay the amounts due, or in case of default that the shares of railway stock upon the secu-

rity of which the bonds had been issued be sold to satisfy the debt. Was this forbidden by the Eleventh Amendment as the earlier suits in New Hampshire and New York against Louisiana had been? The court held that it was not. Here the plaintiff state was the actual owner of the bonds and was as much entitled to sue upon them as it would have been had South Dakota herself originally loaned the money in question. The fact that the bonds were donated to the state did not diminish the state's title to them. South Dakota was here suing in her own behalf and not, as had been true in the earlier cases discussed, merely on behalf of private creditors to whose claims the jurisdiction of the court did not extend. The Supreme Court issued a decree ordering North Carolina to pay the amount due, and in the event of her failure to do so, ordered the sale of the shares of stock held as security. North Carolina after some delay paid the money due so that a forced sale of the bonds was not resorted to.

A recent action brought by North Dakota against Minnesota sought the recovery of damages for injuries resulting from the overflow of certain streams caused by the straightening of certain rivers in Minnesota, and also an injunction against the continuance of the injury. The damages sought were in the amount of $5000 for injury to the public property of the state and $1,000,000 in behalf of the inhabitants of the region affected. These injured persons had joined together and subscribed money to a fund to pay the expenses of the suit and the assurance had been given them they would share in the benefits of a judgment in proportion to the losses they had sustained. This action in behalf of its citizens the Supreme Court held could not properly be brought by the state of North Dakota, under the doctrine of New Hampshire v. Louisiana. See North Dakota v. Minnesota, 263 U. S. 365 (1923).

Mr. Chief Justice Waite, in delivering the opinion of the court, said in part:

. . . The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.

Article 3, section 2, of the Constitution provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and citizens of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the Judiciary Act of 1789, chapter 20, section 13, the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." . . .

[Here follows an account of the case of Chisholm v. Georgia and the subsequent adoption of the Eleventh Amendment.] That amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign state."

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective states after getting the consent of the state, or, to put it in another way, whether a state can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one state against another state. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons. In New Hampshire, before the attorney general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the state can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney general such counsel as he chooses, the state being in no way responsible for fees. All moneys collected are to be kept by the attorney general, as special trustee, separate and apart from the other moneys of the state, and paid over by him to the owner of the claim, after deducting all expenses incurred, not before that time paid by the owner. The bill, although signed by the attorney general, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the state and the attorney general are only nominal actors in the proceeding. The bond-owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and, if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the state.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This state as well as New Hampshire is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the states, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition of the amendment, the states may prosecute the suits, because, as the "sovereign and trustee of its citizens," a state is "clothed with the right and faculty of making an imperative demand upon another independent state for the payment of debts which it owes to citizens of the former." There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in U. S. v. Diekelman, 92 U. S. 524, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war."

All the rights of the states, as independent nations, were surrendered to the United States. The states are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of states in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State." Article 1, section 10, clause 3.

But it is said that even if a state, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another state by force, it got in lieu the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International

Law, vol. 2, (2d Ed.) p. 12: "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the state." Whether this be in all respects true or not, it is clear that no nation ought to interfere, except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. Under the Constitution, as it was originally construed, a citizen of one state could sue another state in the courts of the United States for himself, and obtain the same relief his state could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his state to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one state could have under the Constitution against another state for the redress of his grievances, except such as the delinquent state saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his state, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power, taken away by the grant of the special remedy, was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his state could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state to be sued, and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each of them is dismissed.

VIRGINIA v. WEST VIRGINIA

246 U. S. 565; 62 L. Ed. 883; 38 Sup. Ct. 400. 1918.

The Constitution of the United States provides that controversies between the states of the Union shall be decided by the Supreme Court of the United States in the exercise of its original jurisdiction. This important and delicate function the court has exercised in a large number of cases from the early case of New York v. Connecticut, 4 Dallas 1, which came before the court in 1799, down to the present day. These cases have related to a wide variety of disputes, some of them giving rise to bitter animosities; and it is safe to say that by the exercise of its judical power in these cases the Supreme Court has been able frequently to compose differences which, had they arisen between independent nations, might very easily have led to war. Of these interstate controversies none is more interesting, none affords a clearer idea of the difficulties which the court has had to face in dealing with this type of litigation, than the famous case of Virginia v. West Virginia.

When Virginia seceded from the Union at the outbreak of the Civil War the western counties of the state remained loyal. As the war seemed likely to continue, these loyal counties organized themselves and asked Congress to admit them into the Union as a separate state. The national Constitution provides that no new state shall be formed or erected within the jurisdiction of any other state without the consent of the legislatures of the states concerned as well as of Congress. Accordingly the consent of the loyal portion of Virginia was obtained from an assembly which had been set up, upon the condition that the new state should "take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to January 1, 1861," etc. The necessary formalities were observed and West Virginia was admitted to the Union in June, 1863. In 1871 the Supreme Court was called upon to settle a dispute between Virginia and West Virginia over the joint boundary line, in the course of which it held the formation of the new state to be regular and valid and sustained the claims of West Virginia to the territory over which she was exercising jurisdiction.

The question of the adjustment of the state debt and the payment by West Virginia of her share remained, however, unsettled. From 1865 until 1905 the Virginia authorities made attempts to secure from West Virginia the sums due, but the latter state was disposed to dispute the amount of the obligation resting upon her. Accordingly in 1906 Virginia filed in the Supreme Court of the United States the first of nine separate actions against West Virginia which comprise the judicial history of this important controversy. This first action was in the form of a bill to secure an accounting of the debt between the two states, merely a judicial

determination of the amount due. This amount had never been finally ascertained but had been left by the original agreement between the two states to future adjustment. West Virginia responded to Virginia's action by denying the jurisdiction of the Supreme Court in the controversy, and claiming that even if the Supreme Court should render a final judgment it would have no means of enforcing it. In Virginia v. West Virginia, 206 U. S. 290 (1907), the court held in a carefully reasoned opinion that it had jurisdiction in the controversy and that it would presume compliance upon the part of West Virginia with any decree the court might render, and gave West Virginia leave to file an answer to the complaint of Virginia at the next term of court. When the case came on for hearing at the next term West Virginia filed an answer and the court temporarily disposed of the case by appointing a master to examine all the evidence, consult with the authorities of both states, and present to the court a report upon the whole problem of the amount of the indebtedness in controversy and the methods of determining it. See Virginia v. West Virginia, 209 U. S. 514 (1908). The master appointed by the court made his report, to which various objections were filed by West Virginia. In 1911 the Supreme Court handed down its third decision in the controversy, refusing to make a final decree, suggesting certain principles for determining the debt, and suggesting a conference between the two states to adjust the matter amicably. See Virginia v. West Virginia, 220 U. S. 1 (1911). This decision was rendered in March. During the spring and summer Virginia tried to arrange the suggested conference but was unable to evoke any response from the Governor of West Virginia. Accordingly in October, 1911, Virginia filed a motion in the Supreme Court to proceed with the further consideration and disposition of the case. While it seemed fairly obvious that West Virginia was trying to avoid bringing the case to an issue the court overruled the motion for immediate action. See Virginia v. West Virginia, 222 U. S. 17 (1911). Mr. Justice Holmes, speaking for the court, said that "a state cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed." It was further pointed out that the matter might well wait until the next regular session of the West Virginia legislature in January, 1913. When the legislature did meet it created a commission to represent the state but the course of proceedings convinced Virginia that no satisfactory results were likely to be forthcoming. That state again moved in October, 1913, for an immediate determination of the case by the Supreme Court, to which motion West Virginia objected, asking for six months more time. With unwearied patience the court granted the request for postponement, but since a delay of six months would put the case over until the next term of court and cause more than a year's delay the court set April, 1914, five months hence, as a date for final hearing. See Virginia v. West Virginia, 231 U. S. 89 (1913). On the date set West

Virginia requested leave to file a supplemental answer, setting up certain credits which might reduce the amount of indebtedness. In Virginia v. West Virginia, 234 U. S. 117 (1914), the court granted leave to file such answer, Virginia protesting, and ordered the answer to be rendered to the master who was to be ready to make his report so that the final hearing could be reached in October, 1914. At that time, all possible excuses for further delay having been exhausted, the case was actually pleaded on its merits, the master's report was carefully examined, and a final judgment was rendered. See Virginia v. West Virginia, 238 U. S. 202 (1915). In this decision the indebtedness of the state of West Virginia was set by the court at the sum of $12,393,929.50. One year after this judgment was rendered Virginia asked the Supreme Court for a writ of execution to enforce it. In Virginia v. West Virginia, 241 U. S. 531 (1916) this request was denied on the ground that the action of the state legislature of West Virginia would be necessary to pay the debt and that the legislature had not regularly convened since the judgment was rendered. This denial was made without prejudice to the right of Virginia to renew its petition after the West Virginia legislature had met and had had reasonable opportunity to provide for payment of the debt. The West Virginia legislature met and adjourned without doing anything about the matter and Virginia's petition for a writ of execution was accordingly renewed. It was in this case that the opinion of the court printed below was handed down. It will be noted that even in this case a final decision is postponed. In the hope that West Virginia might still decide to abide by the court's judgment that tribunal set for argument at the ensuing term the question as to the specific means which ought to be employed to enforce the judgment against West Virginia.

At this juncture wiser counsels seem to have prevailed in West Virginia, for in 1919 the legislature of that state in extraordinary session passed a law providing for the payment of the sum due Virginia. A payment of more than a million dollars was provided for in the year 1919 and by a twenty-year bond issue the payment of the balance of the debt with interest was to be made by the year 1939.

Mr. Chief Justice White delivered the opinion of the court, saying in part:

A rule allowed at the instance of Virginia against West Virginia to show cause why, in default of payment of the judgment of this court in favor of the former state against the latter, an order should not be entered directing the levy of a tax by the legislature of West Virginia to pay such judgment, and a motion by West Virginia to dismiss the rule, is the matter before us. . . .

The opinions referred to will make it clear that both states were afforded the amplest opportunity to be heard, and that all

the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that, in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the states to urge the very merits of every subject deemed by them to be material.

And controlled by a like purpose, before coming to discharge our duty in the matter now before us we have searched the record in vain for any indication that the assumed existence of any error committed has operated to prevent the discharge by West Virginia of the obligations resulting from the judgment, and hence has led to the proceeding to enforce the judgment which is now before us. . . .

That judicial power essentially involves the right to enforce the results of its exertion is elementary. . . . And that this applies to the exertion of such power in controversies between states as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain. The many cases in which such controversies between states have been decided in the exercise of original jurisdiction make this truth manifest. Nor is there room for contending to the contrary because in all the cases cited the states against which judgments were rendered conformably to their duty under the Constitution voluntarily respected and gave effect to the same. This must be unless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto in every case, from the foundation of the government, been accepted and applied, it has by that fact alone now become a fit subject for dispute. . . .

Both parties admit that West Virginia is the owner of no property not used for governmental purposes, and that therefore from the mere issue of an execution the judgment is not susceptible of being enforced if, under such execution, property actually devoted to immediate governmental uses of the state may not be taken. Passing a decision as to the latter question, all the contentions on either side will be disposed of by considering two subjects: first, the limitations on the right to enforce inhering in the fact that the judgment is against a state and its enforcement against such governmental being; and second, the appropriateness of the form of procedure applicable for such enforcement. The solution of these subjects may be disposed of by answering two

questions which we propose to separately state and consider.

1. May a judgment rendered against a state as a state be enforced against it as such, including the right, to the extent necessary for so doing, of exerting authority over the governmental powers and agencies possessed by the state?

On this subject Virginia contends that as the Constitution subjected the State of West Virginia to judicial authority at the suit of the State of Virginia, the judgment which was rendered in such a suit binds and operates upon the State of West Virginia; that is, upon that state in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that state and the property which, by the exertion of powers possessed by the state, are subject to be reached for the purpose of meeting and discharging the state obligation. As, then, the contention proceeds, the legislature of West Virginia possesses the power to tax and that body and its powers are all operated upon by the judgment, the inability to enforce by means of ordinary process of execution gives the right and sanctions the exertion of the authority to enforce the judgment by compelling the legislature to exercise its power of taxation. The significance of the contention and its scope are aptly illustrated by the reference in argument to the many decided cases holding that where a municipality is empowered to levy specified taxation to pay a particular debt, the judicial power may enforce the levy of the tax to meet a judgment rendered in consequence of a default in paying the indebtedness.

On the other hand, West Virginia insists that the defendant as a state may not, as to its powers of government reserved to it by the Constitution, be controlled or limited by process for the purpose of enforcing the payment of the judgment. Because the right for that end is recognized, to obtain an execution against a state and levy it upon its property, if any, not used for governmental purposes, it is argued, affords no ground for upholding the power by compelled exercise of the taxing authority of the state, to create a fund which may be used when collected for paying the judgment. The rights reserved to the states by the Constitution, it is further insisted, may not be interfered with by the judicial power merely because that power has been given authority to adjudicate at the instance of one state a right asserted against another, since, although the authority to enforce the adjudication may not be denied, execution to give effect to that authority is restrained by the

provisions of the Constitution which recognize state governmental power.

Mark, in words a common premise—a judgment against a state and the authority to enforce it—is the predicate upon which is rested, on the one hand, the contention as to the existence of complete and effective, and the assertion, on the other, of limited and inefficacious, power. But it is obvious that the latter can only rest upon either treating the word "state" as used in the premise as embracing only a misshapen or dead entity, that is, a state stripped for the purpose of judicial power of all its governmental authority, or, if not, by destroying or dwarfing the significance of the word "state" as describing the entity subject to enforcement, or both. It needs no argument to demonstrate that both of these theories are incompatible with and destructive of the very numerous cases decided by this court. . . . As it is certain that governmental powers reserved to the states by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that when the Constitution gave original jurisdiction to this court to entertain at the instance of one state a suit against another, it must have been intended to modify the general rule; that is, to bring the states and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision. And the context of the Constitution, that is, the express prohibition which it contains as to the power of the states to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the states from resorting to force for the redress of any grievance, real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one state, judicial authority over another.

But it is in substance said this view must be wrong for two reasons: (a) because it virtually overrides the provision of the Constitution reserving to the states the powers not delegated, by the provision making a grant of judicial power for the purpose of disposing of controversies between states; and (b) because it gives to the Constitution a construction incompatible with its plain purpose, which was, while creating the nation, yet at the same time to preserve the states with their governmental authority in order that state and nation might endure. Ultimately the argument at

its best but urges that the text of the Constitution be disregarded for fear of supposed consequences to arise from enforcing it. And it is difficult to understand upon what ground of reason the preservation of the rights of all the states can be predicated upon the assumption that any one state may destroy the rights of any other without any power to redress or cure the resulting grievance. Nor, further, can it be readily understood why it is assumed that the preservation and perpetuation of the Constitution depend upon the absence of all power to preserve and give effect to the great guarantees which safeguard the authority and preserve the rights of all the states. . . .

The state, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even although their exertion may operate upon the governmental powers of the state, we are brought to consider the second question, which is:

2. What are the appropriate remedies for such enforcement?

Back of the consideration of what remedies are appropriate . . . lies the question what ordinary remedies are available, and that subject must necessarily be disposed of. . . . And confining ourselves to a determination of what is appropriate in view of the particular judgment in this cause, two questions naturally present themselves: (a) the power of Congress to legislate to secure the enforcement of the contract between the states; and (b) the appropriate remedies which may by the judicial power be exerted to enforce the judgment. We again consider them separately.

(a) The power of Congress to legislate for the enforcement of the obligation of West Virginia.

The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between states carried with it the right, if the contract was assented to and hence

became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of McCulloch v. Maryland, 4 Wheaton 316, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited, of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true it further follows, as we have already seen, that by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two states which it approved is not circumscribed by the powers reserved to the states. . . .

Nor is there any force in the suggestion that the existence of the power in Congress to legislate for the enforcement of a contract made by a state under the circumstances here under consideration is incompatible with the grant of original jurisdiction to this court to entertain a suit between the states on the same subject. The two grants in no way conflict, but cooperate and coordinate to a common end, that is, the obedience of a state to the Constitution by performing the duty which that instrument exacts. And this is unaffected by the fact that the power of Congress to exert its legislative authority, as we have just stated it, also extends to the creation of new remedies in addition to those provided for by section 14 of the Judiciary Act of 1789 to meet the exigency occasioned by the judicial duty of enforcing a judgment against a state under the circumstances as here disclosed. We say this because we think it is apparent that to provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative, and not the exercise of a judicial, power.

This leaves only the second aspect of the question now under consideration.

(b) The appropriate remedies under existing legislation.

The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. In so far as

the duty to award that remedy is disputed merely because authority to enforce a judgment against a state may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and, on the other hand, it is contended that the duty to give effect to the judgment against the state, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question, and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion, that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because, impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a state and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a twofold way having been also pointed out, we are fain to believe that if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to compel it to discharge a plain duty resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both the requirements of duty and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the case, but, because of the character of the parties and the nature of the controversy,—a contract approved by Congress and subject to be by it enforced,—we should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.

Giving effect to this view, accepting the things which are irrevocably foreclosed,—briefly stated, the judgment against the state, operating upon it in all its governmental powers, and the duty to enforce it, viewed in that aspect,—our conclusion is that the case should be restored to the docket for further argument at the

next term after the February recess. Such argument will embrace the three questions left open: 1. The right, under the conditions previously stated, to award the mandamus prayed for. 2. If not, the power and duty to direct the levy of a tax, as stated. 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy by dealing with the funds or taxable property of West Virginia or the rights of that state, as may secure an execution of the judgment. In saying this, however, to the end that if, on such future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions), occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter, before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state legislature or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any, which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be available for that purpose.

And it is so ordered.

VII. COMMERCE

GIBBONS v. OGDEN

9 Wheaton 1; 6 L. Ed. 23. 1824.

In 1798 Robert R. Livingston secured from the New York legislature an exclusive twenty-year grant to navigate by steam the rivers and other waters of the state, provided that within two years he should build a boat which would make four miles an hour against the current of the Hudson River. The grant was made amidst the ribald jeers of the legislators, who had no faith whatever in the project. The terms of the grant were not met, however, and it was renewed in 1803—this time to Livingston together with his partner, Robert Fulton,—and again for two years in 1807. In August, 1807, Fulton's steamboat made its first successful trip from New York to Albany, and steamboat navigation became a reality. The following year the legislature, now fully aware of the practical significance of Fulton's achievement, passed a law providing that for each new boat placed on New York waters by Fulton and Livingston they should be entitled to a five-year extension of their monopoly, which should, however, not exceed thirty years. The monopoly was made effective by further providing that no one should be allowed to navigate New York waters by steam without a license from Fulton and Livingston, and any unlicensed vessel should be forfeited to them. The business of steamboat navigation developed rapidly. Boats were put in operation between New York and Albany and intervening points, and steam ferries ran between Fulton Street, New York City, and points in New Jersey. Naturally the monopolistic nature of the Fulton-Livingston rights worked hardship on their would-be competitors, and neighboring states began to pass retaliatory laws directed against the New York partners. The New Jersey legislature in 1811 authorized the owner of any boat seized under the forfeiture clause of the Fulton-Livingston charter to capture and hold in retaliation any boat belonging to any New York citizen. Connecticut in 1822 forbade any vessel licensed by Fulton and Livingston to enter the waters of that state, and Ohio passed a somewhat similar law in the same year. Granting such exclusive franchises was a game at which more than one state could play, and such grants were made by the Territory of Orleans (later Louisiana), Georgia, Massachusetts, Pennsylvania, Tennessee, New Hampshire, and Vermont; and with the inevitable increase of feeling created by such policies retaliatory acts became common. In short, an achieve-

ment of science which had seemed destined to enlarge the means of communication and develop the commerce of the nation appeared rather to be embroiling the states in bitter antagonisms and commercial warfare such as prevailed during the dismal period of the Confederation. It is against the background of this intensely acute economic situation that the case of Gibbons v. Ogden must be read.

Ogden had secured a license for steam navigation from Fulton and Livingston. Gibbons had originally been his partner but was now his rival and was operating steamboats between New York and New Jersey under the authority of a coasting license obtained from the United States government. Upon Ogden's petition the New York court had enjoined Gibbons from continuing in business. The great jurist Chancellor James Kent wrote the opinion in this case, upholding the validity of the New York statute establishing the monopoly and repudiating the idea that there was any conflict involved between federal and state authority. An appeal was taken by Gibbons to the Supreme Court of the United States, thus presenting to that tribunal its first case under the commerce clause of the Constitution. It involved the momentous questions: What constitutes commerce? What commerce is interstate? and. What authority, if any, may the states exercise over interstate commerce when Congress has acted with respect to the same subject-matter?

Webster's argument against the validity of the steamboat monopoly was perhaps his greatest effort before the Supreme Court; and some writers believe that Marshall's opinion invalidating the New York law is his greatest state paper; others would place it second only to the opinion in McCulloch v. Maryland. It was perhaps the only genuinely popular decision which Marshall ever handed down. It was received with widespread expressions of approval, for it was, as one writer has put it, "the first great anti-trust decision." The economic consequences of it in freeing a developing commerce from the shackles of state monopoly can hardly be overestimated; and it established for all time the supremacy of the national government in all matters affecting interstate and foreign commerce.

Mr. Chief Justice Marshall said in part:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States.

They are said to be repugnant—

1. To that clause in the Constitution which authorizes Congress to regulate commerce.

2. To that which authorizes Congress to promote the progress of science and useful arts. . . .

As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to

be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The Convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late. . . .

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between

man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. . . .

We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms,

and do not affect the questions which arise in this case, or which have been discussed at the bar. . . .

The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. . . .

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it? . . .

The act passed in 1803, prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the preexisting right of the states to admit or exclude for a limited period. The words are, "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is, to preserve the power to those states which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the states. But this inference is not, we think, justified by the fact. Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. . . .

These acts were cited at the bar for the purpose of showing an opinion in Congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with for-

eign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress, and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

The questions . . . whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of Congress for the regulation of commerce, do not

look to the principle of which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts. . . .

COOLEY v. THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA

12 Howard 299; 13 L. Ed. 996. 1852.

In the early judicial construction of the commerce clause of the Constitution one important and difficult question remained long unanswered: namely, whether the power of Congress to regulate foreign and interstate commerce was absolutely exclusive, or could be shared in part by the states. Gibbons v. Ogden (page 203) had held that state action affecting commerce which is in conflict with congressional regulation is invalid, but it had left unsettled the question whether a state may lawfully legislate regarding subjects pertaining to interstate commerce upon which Congress has passed no law. It was this issue which came before the court in the case of Cooley v. The Board of Wardens of the Port of Philadelphia.

The legislature of Pennsylvania in 1803 had passed a statute establishing an elaborate system of regulations affecting pilotage in the port of Philadelphia and imposing certain penalties of money in case of the failure of a master, owner, or consignee to comply with these rules. Cooley had rendered himself liable to the enforcement of these penalties against him but alleged in appealing his case to the Supreme Court that the state statute was unconstitutional as an invasion of the exclusive authority of Congress over foreign and interstate commerce. In holding the state statute valid since Congress had not legislated independently with respect to pilotage and in view of the local nature of the problems of pilotage the court laid down a rule for determining the exclusive or non-exclusive character of federal commercial regulations which has been of utmost importance and value. It is interesting to note that two justices dissented vigorously on the ground that the power of Congress over commerce should be held absolutely exclusive.

The doctrine of the Cooley case, while simple enough to state, is by no means so simple to apply. Involving as it does the determination by the court of the question whether a particular subject of commercial regulation admits of and requires uniform and national control or whether it is sufficiently local in character to make state regulation permissible, it imposes upon the court the solution of many complicated and difficult questions. The doctrine has been criticized on the ground that the determination of such a question properly belongs to Congress rather than

to the courts; but aside from that the rule has generally been regarded as a wise one, sufficiently protecting federal commercial interests on the one hand while permitting the local control of local commercial problems on the other.

Mr. Justice Curtis delivered the opinion of the court, saying in part:

. . . That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. I Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot

is on board only during a part of the voyage between ports of different states, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage.

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several states, over which it was one main object of the Constitution to create a national control.

. . . And a majority of the court are of opinion, that a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power, contained in the third clause of the eighth section of the first article of the Constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, section 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

. . . we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress did per se deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded on the one side that the nature of this power, like that to legislate for the

District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. . . .

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is

such that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. . . .

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further. . . .

Mr. Justice McLean, with Mr. Justice Wayne concurring, rendered a dissenting opinion. Mr. Justice Daniel rendered an opinion which differed in reasoning but concurred in the judgment of the court.

LEISY v. HARDIN

135 U. S. 100; 34 L. Ed. 128; 10 Sup. Ct. 681. 1890.

In determining in concrete cases the extent to which the power of Congress over interstate commerce is exclusive, under the rule laid down in the case of Cooley v. The Board of Wardens of the Port of Philadelphia (page 213), many difficult problems have arisen out of the exercise by the states of their police power in such a way as to affect either directly or incidentally interstate commerce. Under what circumstances can a state law designed to protect the local health, morals, and safety be enforced against interstate carriers or those engaged in interstate commerce? No more interesting illustration of the complexity of this problem can be found

than in the history of the attempts made by various states from time to time to regulate or prohibit interstate shipments of intoxicating liquor. While the adoption of the Eighteenth Amendment has now disposed of the problem as a practical issue it should be remembered that the principles which the courts worked out for its solution are as applicable to the transportation of any other commodity as they were to intoxicating liquor.

Prohibition sentiment in the states was slow in making itself effective, and it was not until the License Cases, 5 Howard 504 (1847), that the Supreme Court was asked to consider the relation of local regulations of the liquor traffic to interstate commerce. These cases involved the validity of statutes of New Hampshire, Rhode Island, and Massachusetts forbidding the sale of liquor in small quantities and without licenses. In the Rhode Island and Massachusetts cases the liquor in question was imported from abroad; in the New Hampshire case it was brought in from Boston and was sold in the original barrel. The cases presented considerable difficulty. Twenty years before, in the case of Brown v. Maryland, 12 Wheaton 419 (1827), the court had held that goods imported from abroad could not be subjected to license tax requirements by the state as long as they remained unsold or in the original packages. Should a similar rule apply to a barrel of gin shipped from New Hampshire to Boston and there offered for sale in the same barrel? Six justices wrote separate opinions in the case, but the state statutes were sustained. The leading opinion was written by Chief Justice Taney, who took the position that the power of Congress over interstate commerce was not exclusive, and that the license requirements in question were legitimate as long as they conflicted with no federal legislation.

General abatement of interest in the prohibition movement prevented further judicial scrutiny of this problem until 1888. In that year the Supreme Court held invalid an Iowa statute of 1886 imposing a fine of $100 upon any railroad which should knowingly bring into the state intoxicating liquor without first obtaining a certificate that the consignee could lawfully sell it, Bowman v. C. & N. W. Ry. Co. 125 U. S. 465 (1888), as an attempt on the part of the state to exercise jurisdiction beyond its own territorial limits and a direct interference with interstate commerce. Two years later the case of Leisy v. Hardin was decided.

Leisy, a brewer in Peoria, Illinois, had shipped certain barrels and cases of beer to a consignee in Keokuk, Iowa. There the beer was seized while still in the original packages by Hardin, the city marshal, acting under authority of an Iowa statute forbidding the manufacture and sale of intoxicating liquor except for medicinal, sacramental, etc. purposes. Leisy brought an action (replevin) against Hardin to recover possession of the beer, alleging the unconstitutionality of the statute because it authorized state confiscation while still in the original packages of goods shipped in interstate commerce. The court sustained Leisy's contention, and applied its famous "original package rule" that until the original packages

had been broken or the goods had been sold commodities shipped in interstate commerce were not subject to the police power of the state. It emphasized that the transportation of products across state lines is a subject calling for uniform and national regulation within the principle enunciated in the Cooley case. Apparently conscious, however, of the devastating results of its decision upon the practical enforcement of state prohibition laws the court suggested, or implied, in several parts of its opinion that Congress might consent to the exercise of the police power by the states over articles of interstate commerce at an earlier point than was possible without such consent. In short, the court seemed to invite Congress to provide a legislative remedy for the difficulty which its decision created.

This invitation was acted upon by Congress with promptness and within a few months the Wilson Act was placed upon the statute book. This provided that liquor shipped through the channels of interstate commerce into any state should "upon arrival in such state" be subject immediately to the police power of the state regardless of whether or not it remained in the original packages. This statute was held constitutional by the Supreme Court in the case of In re Rahrer, 140 U. S. 545 (1891), against the contention, among others, that it involved a delegation to the states of the power over interstate commerce. The beneficial results intended by the enactment of the Wilson Act were, however, of short duration. In 1898 a box labeled "groceries" and consigned to one Horn was received by the station agent at Brighton, Iowa, and placed by him in the station warehouse, where a few hours later it was seized under a search warrant by a constable on what proved to be the correct suspicion that it contained liquor. The question of the validity of this seizure was finally brought to the Supreme Court of the United States, which held that the words "upon arrival in such state" used in the Wilson Act meant arrival actually in the hands of the consignee, and that until such arrival the exclusive jurisdiction of Congress over goods shipped in interstate commerce protected them from state interference. Rhodes v. Iowa, 170 U. S. 412 (1898).

The difficult problem of devising a plan whereby the states could adequately protect themselves from liquor brought in through interstate commerce without encroaching upon the domain of federal control over such commerce was at last solved by the enactment in 1913 of an ingenious piece of federal legislation, the Webb-Kenyon Act. This was in some ways one of the most remarkable laws which Congress ever passed. It merely provided that the shipment of intoxicating liquors into any state or territory, when such liquors were intended by any persons interested in them to be used or sold in violation of the law of such state or territory, should be prohibited. No federal penalty was attached to the statute; it merely outlawed from interstate commerce shipments of liquor to be used in violation of state law. The state, therefore, was at liberty to

seize and confiscate them as soon as it could get its hands on them. There were grave doubts in many minds as to the validity of this act, which, it was alleged, amounted to an abdication by Congress of a portion of its authority over interstate commerce. President Taft, upon the advice of Attorney General Wickersham, vetoed the bill upon this ground but it was passed over his veto. The Supreme Court, however, upheld the validity of the law in the case of Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311 (1917), pointing out that after all it was the will of Congress which made the prohibitions in question effective and that the rule established was uniform even though the conditions calling its provisions into play might vary from state to state. In 1917 Congress went still further in the passage of the Reed "Bone-Dry" Amendment, and forbade under federal penalty the shipping even for personal use of intoxicating liquor into any state which forbade its manufacture or sale. In other words, a state which merely extended its prohibition policy to manufacture and sale still found itself subjected to "bone-dry" prohibition so far as interstate shipments were concerned. This act was sustained by the Supreme Court in the case of United States v. Hill, 248 U. S. 420 (1919).

Mr. Chief Justice Fuller delivered the opinion of the court, saying in part:

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. . . .

And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action. . . . The power to regulate commerce among the states is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the

states may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government. Where the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states; but where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley v. Port Wardens of Philadelphia, 12 Howard, 299.

It was stated in the thirty-second number of the Federalist that the states might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the federal Constitution; second, where it was given to the United States and prohibited to the states; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the states upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with

such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled. . . .

That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister state, so become part of the common mass of property within a state as to be subject to its unimpeded control?

In Brown v. Maryland, 12 Wheaton 419, the act of the state legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the states to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states; that that power was complete in itself, acknowledged no limitations other than those pre-

scribed by the Constitution, was co-extensive with the subject on which it acts and not to be stopped at the external boundary of a state, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister state. Manifestly this must be so, for the same public policy applied to commerce among the states as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. . . .

The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. [Here follows an enumeration of cases involving state taxes or police regulations affecting interstate commerce.]

These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

. . . Undoubtedly, it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a state may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the

common mass of property therein, if in its judgment the end to be secured justifies and requires such action. . . .

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman v. Chicago &c. Railway Co., 125 U. S. 465, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found. . . .

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of article 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Gray, with whom concurred Mr. Justice Harlan and Mr. Justice Brewer, rendered a dissenting opinion.

HAMMER v. DAGENHART

247 U. S. 251; 62 L. Ed. 1101; 38 Sup. Ct. 529. 1918.

With the doctrine in mind of the delegated nature of congressional power it is customary to say that the federal government has no police power. By this is meant that there is no general grant of authority to Congress to pass laws for the protection of the health, morals, safety, good order, and general welfare of the country. Such police power is reserved to the several states. But acting upon the principle that its powers are to be liberally construed Congress has been able to enact a wide range of federal police legislation by the process of using its powers over commerce, taxation, and the mails as "constitutional pegs" upon which to hang policies for the national welfare which it has no direct authority to promulgate. This has proved to be one of the most interesting phases of our constitutional development and has made possible a high degree of federal centralization and an extension of congressional control over many social and economic problems. Perhaps the most significant development along these lines has been that which has rested upon the commerce clause as a foundation.

There have been at least two theories upon which the exercise of a national police power under the commerce clause has been sustained. The first is the very obvious one that Congress may properly use its commerce power to protect such commerce from obstruction or danger, as well as to promote its efficiency. In this class would fall the federal safety appliance acts, laws regulating the transportation of explosives, restrictions upon the hours of service of trainmen and telegraphers, the federal employers' liability statute, the anti-trust legislation, and many similar enactments. While Congress in passing these laws has frequently been moved by the desire to push to the limit its control over social and economic problems, the courts have consistently taken the view that such laws were constitutional because they tended to keep interstate and foreign commerce safe, efficient, and unobstructed. See Baltimore & Ohio R. Co. v. Interstate Commerce Commission, 221 U. S. 612 (1911), sustaining the Hours of Service Act, and Second Employers' Liability Cases, 223 U. S. 1 (1912), upholding the Federal Employers' Liability Act of 1908.

In the second place, the courts have held that Congress may legitimately prohibit the use of interstate or foreign commerce as a means of promoting objectionable transactions or as a channel for the distribution of obnoxious products. An early application of this principle was in the Lottery Act of 1895, which forbade the sending of lottery tickets through interstate commerce or the mails. This was sustained by the Supreme Court in the Lottery Case, Champion v. Ames, 188 U. S. 321

(1903), in which, after holding that lottery tickets were articles of commerce, the court went on to uphold the authority of Congress to guard the people of the United States from the "widespread pestilence of lotteries" by preventing their transmission through the channels of a commerce of which Congress is the only guardian. Congress has not been slow to exercise the police power thus established. It has passed laws excluding from interstate commerce impure or adulterated food and drugs, meat not properly inspected, obscene literature, prize fight films, and various other injurious or fraudulent commodities. Similar in character was the White Slave Act of 1910 which struck at the white slave traffic by forbidding the interstate transportation of women for immoral purposes. This act was held constitutional by the Supreme Court in the case of Hoke v. United States, 227 U. S. 308 (1913). It may be noted in passing that the power of Congress over the postal system has enabled it to exercise a wide police power by means of excluding objectionable articles from the mails, or by preventing the use of postal facilities for the perpetration of fraud.

It was not unnatural that those who watched the gradually expanding sphere of federal police legislation should tend to lose sight of the possible limits of that power and should come to feel that there must be a federal remedy for any truly national social problem. Why, for instance, should not the federal government deal with the problem of child labor? As early as 1906 a national child labor law grounded on the commerce clause was proposed. In that year bills embodying such legislation were introduced into the Senate by Senator Beveridge of Indiana and Senator Lodge of Massachusetts, which proposed to exclude from interstate commerce goods manufactured by children. These bills were not passed but they called forth much discussion, especially as to their constitutionality. The movement for the enactment of such legislation developed in strength, however, largely due to the efforts of the National Child Labor Committee; and in 1916 the Keating-Owen Act was passed. This law forbade the transportation in interstate commerce of the product of any mine or quarry in which within thirty days prior to its removal therefrom children under the age of sixteen had been allowed to work, or the product of any mill, cannery, workshop, factory, or manufacturing establishment in which within thirty days prior to the shipment of the product children under fourteen were allowed to work, or children under sixteen were allowed to work more than eight hours per day or more than six days per week or between the hours of seven in the evening and six in the morning. The prohibition here is more sweeping than in the Beveridge and Lodge proposals because it extends to all the products of establishments employing children, instead of merely to the products made by children themselves. If a manufacturer employed but one child for but a fraction of a day the ban would still fall upon

the entire product of his plant for the thirty day period subsequent to which such employment occurred. Almost immediately after the law became operative Dagenhart, the father of two children, one under fourteen and one between fourteen and sixteen, who were employed in a cotton-mill in Charlotte, North Carolina, brought action to enjoin Hammer, the United States district attorney for that district, from enforcing the law against the employment of the two children. The federal district judge granted the injunction on the ground that the Keating-Owen Act was unconstitutional, and Hammer took an appeal to the Supreme Court.

It is not often that a constitutional question arises upon which the professional opinion of the country divides as sharply as it did upon the question of the validity of this law. It was strenuously urged in favor of the statute that it was a legitimate regulation of interstate commerce, that the power to regulate such commerce includes the power also to prohibit entirely commerce in certain commodities and under certain circumstances, that child labor is promoted by interstate transportation since without the privilege of such transportation no one could afford to employ children, and that therefore this statute merely prohibits the use of interstate commerce to promote child labor in the same sense in which its use for the purpose of promoting the white slave traffic is prohibited in the Mann Act of 1910. The essential argument of the opponents of the law was that it was not a regulation of interstate commerce at all, but a regulation of labor conditions antecedent to such commerce, and was therefore outside the range of congressional authority and an invasion of the reserved powers of the states. The closeness of the division of opinion here may be appreciated from the fact that the court was divided five to four in its decision, as well as from a comparison of the opinions written by the majority and minority justices.

Whatever may be one's opinion as to the relative merits of the two sides of this controversy, it is well to remember that the Keating-Owen Act did actually represent a type of regulation with respect to interstate commerce quite different in character from the Pure Food Act and the White Slave Act. The child labor law excluded from interstate commerce harmless commodities because Congress disapproved of the conditions under which they were produced. The exclusion was in a sense a penalty imposed upon those who maintained the forbidden conditions. To have upheld the child labor law would at the minimum have extended the power of Congress over all phases of labor conditions in industries dependent upon interstate commerce. This would have involved a serious inroad upon the field of state police legislation.

Mr. Justice Day delivered the opinion of the court, saying in part:

. . . The attack upon the act rests upon three propositions:

First. It is not a regulation of interstate and foreign commerce. Second. It contravenes the Tenth Amendment to the Constitution. Third. It conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock P. M. or before the hour of 6 o'clock A. M.?

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the states.

In Gibbons v. Ogden, 9 Wheaton 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate. [The court then discusses the several cases mentioned in the note introducing this case.]

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended

to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. . . .

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. "When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." Mr. Justice Jackson In re Greene, 52 Fed. 113. This principle has been recognized often in this court. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. . . .

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition thus engendered may

be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulation; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in United States v. Dewitt, 9 Wallace 41, 45, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." . . .

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our federal government is one of enumerated powers. . . .

In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. . . . The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. . . . To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the district court must be affirmed.

Mr. Justice Holmes, dissenting, said in part:

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of cotton mill [etc.]. . . . The objection urged against the power is that the states have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in any argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued to-day that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulations may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. Champion v. Ames, 188 U. S. 321. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by

the fact that it might interfere with the carrying out of the domestic policy of any state.

The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present chief justice excluded any inquiry into the purpose of an act which, apart from that purpose, was within the power of Congress. McCray v. United States, 195 U. S. 27. . . . Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The court made short work of the argument as to the purpose of the act. "The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers." Veazie Bank v. Fenno, 8 Wallace 533. . . . And to come to cases upon interstate commerce, . . . the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding because that commerce was the end actually in mind. The objection that the control of the states over production was interfered with was urged again and again, but always in vain. Standard Oil Co. v. United States, 221 U. S. 1. . . .

The Pure Food and Drug Act which was sustained in Hipolite Egg Co. v. United States, 220 U. S. 45, with the intimation that "no trade can be carried on between the states to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful, but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. Weeks v. United States, 245 U. S. 618. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that, in the opinion of Congress, the transportation encourages the evil.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed,—far more unanimously than they have with regard to intoxicants and some

other matters over which this country is now emotionally aroused,—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was preëminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink, but not as against the product of ruined lives.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in Champion v. Ames. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concur in this opinion.

DAYTON-GOOSE CREEK RAILWAY COMPANY v. UNITED STATES

263 U. S. 456; 68 L. Ed. 388; 44 Sup. Ct. 169. 1924.

It is clear that Congress has full control over interstate commerce. It is equally clear that the regulation of purely local, or intrastate, commerce is left to the states. While it may seem simple to draw a line sharply between the two it has not in practice proved an easy task, since in the practical conduct of business local and interstate commerce are so closely related as parts of one great system that they merge into each other. Policies and regulations adopted with reference to local commerce are found to have important incidental affects upon interstate commerce, and the federal government has found that in order to maintain unified national control over interstate commerce it must reach back in some instances and deal with matters which seem at first to have purely local significance. In short, in order to regulate adequately interstate commerce Congress must sometimes regulate intrastate commerce, and when this incidental regulation is clearly justified as a means of dealing with the commerce which is of national concern the Supreme Court has held that it is a legitimate exercise of the power of Congress over interstate commerce. No more striking instance of this apparent intrusion of federal authority into the field of local commercial regulation can be found than in the field of railroad rate regulation. Three recent cases establish upon a sound constitutional basis a degree of national control over local commerce as a means of protecting and promoting interstate commerce which, in the days of Jefferson and Hamilton, would have been looked upon as a flagrant violation of the essential principles of the federal system.

In 1914 the Supreme Court decided the important case of Houston, East & West Texas Ry. Co. v. United States, 234 U. S. 342, commonly known as the Shreveport Rate Case. The case might well be studied with the aid of a map. Shreveport is located in northwestern Louisiana near the Texas border and aims to serve as a distributing center from which products may be shipped to the near-by towns across the border in Texas, one of which is the town of Marshall. Such transactions constituted interstate commerce and the Interstate Commerce Commission had determined a reasonable freight rate on the carriage of such products. Competing with Shreveport for these eastern Texas markets are the Texas distributing centers of Dallas and Houston, located to the west and considerably farther away than Shreveport. The Texas Railway Commission established freight rates, applicable only to transportation within the state, which were much lower than the interstate rate established by the Interstate Commerce Commission. This meant that merchants in Marshall and

other Texas towns of the vicinity could by reason of these lower local rates buy more cheaply in Dallas or Houston, although the distance was greater, than they could in Shreveport. The rate on wagons, for instance, from Dallas to Marshall, 147.7 miles, was 36.8 cents, and from Shreveport to Marshall, 42 miles, was 56 cents. Thus the Texas rates virtually cut Shreveport off from the Texas markets and discriminated against interstate commerce. Complaint was made regarding the situation to the Interstate Commerce Commission which, sustaining its own interstate rates as reasonable, ordered the railroads serving the section to increase the rates upon local hauls to a point where they ceased to be discriminatory against interstate transportation. The Supreme Court sustained the power of the commission, holding that the plenary power of the federal government over interstate commerce extended to the exercise of any necessary measure to protect such commerce from obstruction or discrimination; and maintained further that inasmuch as the interstate rates were reasonable, and the carriers were obliged to remove the discrimination, the carriers were therefore free to increase intrastate rates. Thus, for the first time, a state was compelled by the federal government to allow an increase of freight rates on local commerce, not in themselves unreasonable or confiscatory, because of their incidental effect upon interstate commerce.

The principle of the Shreveport Case was reaffirmed and considerably broadened in the case of Railroad Commission of Wisconsin v. C. B. & Q. R. Co., 257 U. S. 563 (1922). This case arose under the Transportation Act of 1920, an elaborate statute by which Congress sought to guarantee to interstate railroads a fair return upon their property in order that adequate railway service might be maintained, and also to prevent discrimination against interstate commerce by state railroad commissions. To this end the powers of the Interstate Commerce Commission were considerably enlarged. After careful consideration the commission found that so far as the roads in the rate-group including Wisconsin, Minnesota, and near-by states were concerned, a passenger fare of 3.6 cents per mile was necessary in order to increase the profits of the roads to the point which would assure efficient service. It accordingly established this rate. At the same time the roads operating trains solely within the state of Wisconsin were forbidden by a state statute to charge more than 2 cents per mile. It soon became apparent that a continuance of this situation would operate to the great disadvantage of the interstate business of the carriers. A tendency promptly showed itself on the part of travelers and shippers to avoid the high interstate rates by buying new tickets on crossing state borders, and by shipping their goods over local though roundabout routes. The roads contended that this discrimination against interstate traffic reduced their profits upon such traffic, and that such reduction of profits would make

necessary further increases in interstate rates if a fair return was to be earned; that this in turn would increase the intensity of the discrimination arising out of the lower state rates, and that, in short, the whole scheme embodied in the Transportation Act would fail of achievement if the states were not compelled to bring up the local rates to a point which would wipe out such discrimination. The Interstate Commerce Commission, convinced of the soundness of this view, ordered increases in all intrastate rates in order to remove the discrimination complained of. This order the Supreme Court sustained. The basis of the decision was trenchantly expressed by Mr. Chief Justice Taft in the following paragraph: "Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority. . . ."

The case of Dayton-Goose Creek Railway Co. v. United States involved a further application of the principle underlying the cases just discussed and also emphasized the completeness with which the interstate railroads are subject to the dominating authority of the federal government. It raised the question of the validity of the famous "recapture" clause of the Transportation Act of 1920. This clause provided in substance that since it is impossible to establish uniform railroad rates upon competitive traffic which will yield a return adequate to sustain all the roads necessary to do the business without giving some of the roads a net income in excess of a fair return, any road receiving profits in excess of such return (fixed at first at 5½% and subject to slight increase) should pay one-half of it into a reserve fund to be maintained by the carrier for certain specified purposes, and the other half into a general railroad revolving fund to be used by the Interstate Commerce Commission to make loans to carriers to meet expenditures on capital account, etc. In short, Congress desires to establish a fair uniform rate throughout certain territorial divisions of the country, and in order to do this it provides that the roads that make too much money under this rate shall place part of the surplus at the disposal of the weaker roads that do not make enough. In this way Congress seeks to build up a system of railway transportation adequate to handle upon a fair-paying basis all the interstate commerce of the country. This recapture of excess profits by the government was held constitutional by the Supreme Court. Unlike a private business the railroad has no constitutional right to earnings which exceed a fair return. The fact that part of the excess income thus appropriated comes from earnings from local commerce carried on by the roads and thereby interferes with such local commerce was held

to constitute no valid objection to the law, since such regulation is incidental to the general plan of regulating interstate commerce.

Mr. Chief Justice Taft delivered the opinion of the court, saying in part:

. . . the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. . . .

If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service.

Title 4 of the Transportation Act, embracing sections 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that, when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker

roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold one-half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He, with every other shipper similarly situated in the same section, is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required, in the rates he pays, to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. . . .

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section, and was doing all the business,

this would be clear. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. . . .

We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation, that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process. . . .

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the states and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the states and the nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. . . . The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates, which, if present, is indistinguishable. . . .

The decree of the district court is affirmed.

MUNN v. ILLINOIS

94 U. S. 113; 24 L. Ed. 77. 1877.

This is the first of a famous group of cases usually called the "Granger Cases." They were decided during the seventies and eighties and involved the new and important problem of the extent of the power of state legislatures to regulate the rates and service of railroads and other businesses affected with a public interest. The close of the Civil War ushered in a period of rapid railroad expansion. In the east, where industrial development tended to keep pace with the multiplication of transportation facilities, railroad building proved satisfactorily profitable. In the west, however, where new country was being opened up and population was sparse, the railroads had difficulty in paying dividends and frequently yielded to the temptation to indulge in stock-watering, questionable manipulation of credits, doubtful practices in respect to grants of lands, rebating, discrimination, and other objectionable practices. As against the desperate efforts of the railroads to make profits there existed a desire upon the part of the western farmer to enjoy adequate railroad facilities at reasonable rates in order to facilitate the movement of crops in sparsely settled communities, together with fierce resentment against the unfair or dishonest methods of which some of the roads were known to be guilty. Out of this conflict of interests grew the Granger Movement, an organized effort upon the part of the western farmers to secure through state legislation the remedies which they felt the evils of the existing transportation system demanded. Granger legislation began in Illinois in 1871 with the enactment of a statute, authorized by the new state constitution of 1870, which created a railroad and warehouse commission with supervisory power over the roads, forbade discrimination under severe penalties, and established maximum passenger and freight rates. Other states followed the lead taken by Illinois; and soon the railroads found themselves subjected to a wide variety of restrictive and more or less burdensome laws, some of them vitally affecting their earning capacity. In the Granger cases the validity of these laws was presented to the Supreme Court.

Munn v. Illinois did not relate to railroad rate legislation but dealt rather with the question of the validity of an Illinois statute providing for the fixing of maximum charges for the storage of grain in warehouses in Chicago and other places having not less than one hundred thousand population, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved." The case was argued before the Supreme Court by eminent lawyers, and the decision was awaited with wide-spread

interest not only by the granges but by all those who had money invested in businesses which the states were seeking to regulate. Here, as in the Slaughterhouse Cases, an attempt was made to convince the court that the legislation in question was in violation of the Fourteenth Amendment. It was urged that it involved a deprivation of property without due process of law and a denial of the equal protection of the law. But here again the attempt failed. The court decided that terminal grain elevators were businesses affected with a public interest sufficiently to enable the legislature to regulate the charges which they made, and then went on to point out that the Fourteenth Amendment provided no restriction upon burdensome or confiscatory rates. In cases where the legislature could regulate rates at all the degree of regulation was a matter of legislative discretion, and "for protection against abuses by legislatures the people must resort to the polls, not to the courts." This somewhat startling proposition was not strictly called for by the facts of the Munn case and was in the nature of obiter dictum, since the limits imposed upon grain elevator charges had not been attacked before the court as being confiscatory in character, but rather the right of the legislature to establish any rate at all had been challenged.

It would have been wholly out of keeping with the judicial development of the Fourteenth Amendment if the court had not retreated from the position taken in this dictum in Munn v. Illinois. As in the case of the police power of the state the court, step by step, came to look upon the due process clause as imposing a judicially enforceable check upon unreasonable or arbitrary exercise of the power of public utility regulation. In the case of C. M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418 (1890), the court held that a railroad rate established by a state railroad and warehouse commission could not be regarded as conclusively reasonable and that unless a way was provided whereby the question of reasonableness might be judicially determined there was a denial of due process of law. This doctrine was reaffirmed and extended in the case of Reagan v. Farmers' Loan and Trust Co., 154 U. S. 362 (1894). A still further advance in the direction of complete judicial review of rate regulation was made in the celebrated case of Smyth v. Ames, 169 U. S. 466, decided in 1898. The railroad rate under review in this case had been established directly by the legislature itself and not by a commission, and it was strongly defended as being not unreasonable. The Supreme Court in invalidating the rate laid down in this decision the important principle that due process of law requires not merely a judicial review of the reasonableness of rates, as had been established in the earlier cases, but requires also that the rate established shall be such as will allow the railroad a fair return on a fair valuation of its investment. Whether the return from a particular rate is fair or not is a judicial question, although the court did not in this case define what

it meant concretely by "fair." In 1909 the court threw some light upon this last point by holding in the case of Willcox v. Consolidated Gas Company, 212 U. S. 19, that a rate was not confiscatory which allowed a return on the capital investment of six per cent.

Mr. Chief Justice Waite delivered the opinion of the court, saying in part:

. . . Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states. . . .

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. & B. Railroad Co., 27 Vt., 140; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.* From this source come the

police powers, which . . . "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. . . .

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . .

And the same has been held as to warehouses and warehousemen. . . .

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. . . .

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. . . . Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that ". . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the west with four or five of the states lying on the seashore, and forms the largest part of interstate commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. . . . It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has,

therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the west" must pass on the way "to four or five of the states on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." . . . Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," article 13, section 7; and by section 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads. This indicates very clearly that

during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. . . .

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise.

In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. . . .

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wallace 284, 293, that "it is not everything

that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done. . . .

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. . . . Judgment affirmed.

Mr. Justice Field rendered a dissenting opinion, in which Mr. Justice Strong concurred.

VIII. TAXATION

THE COLLECTOR v. DAY

11 Wallace 113; 20 L. Ed. 122. 1871.

In McCulloch v. Maryland (page 7) the Supreme Court held unconstitutional a state law levying a tax specifically and by conscious discrimination burdening an important federal agency, the Bank of the United States. But this immunity of national instrumentalities, property, and agents from state taxation is not confined to immunity from state laws which discriminate against such federal interests, but extends to all state taxing statutes which interfere even incidentally with the federal government or its agencies. Thus in 1842 in the case of Dobbins v. Commissioners of Erie County, 16 Peters 435, it was held that under a Pennsylvania statute authorizing the taxation of "all offices and posts of profit" the salary or office of a captain of a United States revenue cutter could not constitutionally be taxed. Such a tax, though not discriminating against federal salaries, was held to subject them to state control in a manner incompatible with the entire freedom and independence of the national government within its own proper sphere of action. Similarly it has been held, Weston v. Charleston, 2 Peters 449 (1829) that a state may not tax United States stock, since such a tax would directly affect the salability of the stock and thus operate as a restriction upon the borrowing power of the United States. Nor may a state impose a tax upon a franchise granted by the federal government to a railroad company, California v. Central Pacific R. R. Co., 127 U. S. 1 (1888); nor may it tax property owned by the United States, Van Brocklin v. Tennessee, 117 U. S. 151 (1886).

But this is a rule that works both ways in our federal system. If the state may not tax the agencies or instrumentalities of the federal government, neither may the federal government tax those of the state. The state is presumed by the federal Constitution to be as free and untrammeled in the performance of its normal governmental functions as is the national government, and this is the principle upon which the case of Collector v. Day rests. There have been those who have urged that there is not the same danger in a federal tax on a state salary as there is in a state tax on a federal salary, since the federal tax, uniform throughout the country, is really a tax laid on the whole country by the representatives of the whole country, whereas the state tax on fed-

eral salaries is in a sense a tax levied by one state upon the officers of the whole nation. This distinction, however, has not found expression in the opinions of the Supreme Court. In the case of Mercantile Bank v. New York, 121 U. S. 138 (1887), it was held that the United States could not tax state or municipal bonds in the hands of private owners; while in Pollock v. Farmers' Loan and Trust Company, 158 U. S. 601 (1895), the income from municipal bonds was held exempt from federal income taxation.

This limitation upon the national government is not, however, quite so strictly construed as the correlative restriction laid upon the states. This is emphasized particularly in the interesting case of South Carolina v. United States, 199 U. S. 437 (1905). South Carolina had established dispensaries for the wholesale and retail sale of intoxicating liquors and forbade the sale by any one except the dispensers. The United States required these dispensers to pay the license taxes required by the federal internal revenue act. The dispensers individually did not receive the profits from the sale of the liquor, all such profits going to the state which shared them equally with the cities and counties where the sales were made. In 1901 these profits amounted to $545,248.12. After paying the federal license taxes for some time without protest the state in 1901 objected to the making of further payments and brought suit in the court of claims to recover the taxes already paid. From an adverse decision in that court the state appealed to the Supreme Court of the United States. Here it was decided that the taxes were properly imposed. The court took the position that the state in engaging in the liquor business was not exercising a governmental function but was conducting a private business from which it expected to make profits. As such it was subject to taxation by the national government as any other business enterprise privately operated might be. It was also suggested that with the possible extension of state functions various other kinds of business might be placed in the hands of the state and the federal government might find itself, if these were all held free from federal taxation, without adequate means of securing necessary federal revenue. Three justices dissented on the ground that in conducting the dispensary system South Carolina was merely exercising her police power and should be free from federal interference.

Mr. Justice Nelson delivered the opinion of the court, saying in part:

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state? . . .

The general government, and the states, although both exist within the same territorial limits, are separate and distinct sover-

eignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states.

The relations existing between the two governments are well stated by the present Chief Justice in the case of Lane County v. Oregon, 7 Wallace, 71, 76. "Both the states and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the confederate government, which acted with powers greatly restricted, only upon the states. But, in many of the articles of the Constitution, the necessary existence of the states, and within their proper spheres, the independent authority of the states, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved." Upon looking into the Constitution, it will be found that but few of the articles in that instrument could be carried into practical effect without the existence of the states.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the states. The Constitution guarantees to the states a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and re-

served rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the states under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen states were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent, as those which led to the exemption of the federal officer in Dobbins v. The Commissioners of Erie from

taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion? . . .

Mr. Justice Bradley in dissenting, said:

I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of the state governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the state government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the state governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the state governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the state governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other states and their citizens are equally interested with the state which imposes the taxation. In my judgment, the limitation of the power of taxation

in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the state governments which will be interfered with by federal taxation? If a state incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the state governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

THE CHILD LABOR TAX CASE

BAILEY v. DREXEL FURNITURE COMPANY

259 U. S. 20; 66 L. Ed. 817; 42 Sup. Ct. 449. 1922.

It is well established in the law of taxation that if the power to tax exists at all with reference to a person or commodity the tax actually imposed is not unconstitutional merely because it is deemed too high. A tax of 100% is no more invalid than a tax of 1%. The only checks upon the rate of taxation are political checks. An actual fiscal need will justify even very burdensome levies. This is apparently what Chief Justice Marshall meant when, in his opinion in the case of McCulloch v. Maryland (page 7), he said, "the power to tax is the power to destroy." This maxim, however, has been given a somewhat different interpretation by some writers and has been assumed to mean that the power of taxation might be used independently as a means of driving out of existence commodities or practices regarded as obnoxious by the taxing authority. This theory has been used to support the exercise by Congress of a wide police power through the use of destructive taxes. The questions involved in the federal child labor tax case represent the culmination of a long controversy regarding the purposes for which Congress may legitimately levy taxes, and some aspects of that controversy should be thoroughly understood.

There could never be any doubt as to the propriety of using the taxing power of Congress as a means of raising revenue, since that is the obvious and primary reason for establishing the power. But almost immediately after the organization of the national government Congress, over the protest of the strict constructionist school, passed a protective tariff; and during most of our subsequent history we have had similar legislation on our statute books. Some of the tariff schedules have been so high as to prevent entirely the importation of certain commodities, and in such cases it would seem that Congress had used its power of taxation for the purpose of destroying the thing taxed. A still more striking instance of the same thing is to be found in the federal tax upon state bank notes levied by Congress in 1866. This imposed a tax of 10 % upon all bank notes issued by state banks and had the desired result of preventing the further issue of such notes. Curiously enough the constitutionality of a protective tariff has never been passed upon directly by the Supreme Court of the United States, but the validity of the bank note tax came before the court in the case of Veazie Bank v. Fenno, 8 Wallace 533 (1869), and from that decision may be drawn the general principle upon which this type of taxation may be upheld. It was pointed out by the court that while the 10 % tax was undoubtedly destructive, it was merely a use by Congress of its power to tax as a means of doing something indirectly which it might, had it seen fit, have done directly; namely, the protection of the note issue of the newly established national banks from the competition of state bank notes. Congress has full delegated authority over the federal currency, and could in the exercise of that power have prohibited the further issuance of state bank notes by a simple prohibition. It chose to use the indirect method of taxation, but in so doing the power of taxation is being used as a means of exercising the power over the currency. In the same way a prohibitive tariff may be defended as a means by which Congress exercises its admitted power to promote and control foreign commerce.

But Congress has gone farther than this in the use of its power to tax and has from time to time established destructive or regulatory taxes for the purposes of exercising authority not within the scope of its delegated power. In 1902 it imposed a tax of ten cents per pound upon all oleomargarine colored to look like butter. In 1890 a tax of $10 per pound was placed upon smoking opium and in 1914 this tax was increased to $300 per pound. In 1912 Congress made impossible the manufacture of matches in which poisonous phosphorous is used by placing upon such matches a tax of two cents per hundred. The oleomargarine tax is the only one of these which came before the Supreme Court for review as to its validity. This was in the case of McCray v. United States, 195 U. S. 27 (1904). This opinion will bear careful study. In it Mr. Justice White, who as a United States Senator from Louisiana

in the early nineties had vigorously protested against the constitutionality of a similar taxing statute then pending before Congress, held that since the tax imposed had all the external appearances of an ordinary revenue act the court could not invalidate it because it was destructive in its effect or because Congress in imposing it had sought to exercise a police power which was beyond the scope of its delegated authority. In short, if the tax is "on its face" a revenue act the courts are not permitted to question further into the motives which may have actuated its enactment. While the language used in the opinion was guarded it seemed on the whole to lend support to those who were advocating the use of the taxing power of Congress as a means of exercising a general police power.

It was natural, therefore, that when, after the disappointment of the Supreme Court's decision in the case of Hammer v. Dagenhart (page 225), the opponents of child labor turned their attention to the problem of finding a constitutional basis for the enactment of a new federal child labor law, they should turn to the taxing clause with some assurance that here they would be on safer ground. Accordingly there emerged after some debate the child labor tax provision of the general Revenue Act of February 24, 1919. This imposed a 10 % excise tax upon the annual net profits of mines, quarries, factories, and other establishments which during any portion of the taxable year employed children contrary to the regulations established. These regulations as to age, hours, and days of labor, etc., were identical with those in the Keating-Owen Act (page 226). The Drexel Furniture Company permitted a boy under the age of fourteen years to work in its factory during the taxable year 1919. It received notice from Bailey, who was United States collector of internal revenue for the district, that the firm would be assessed 10 % of its net profits for the year, or $6,312.79, under the provisions of the child labor tax act. It paid the tax under protest and brought suit to recover the amount of the tax upon the ground that the law imposing it was unconstitutional. The case came on writ of error to the Supreme Court of the United States.

It should be noted that but one justice dissented from the opinion of the court in this case and the decision itself received much less criticism than did the decision in the case of Hammer v. Dagenhart. The case established an important check upon the exercise by Congress of the taxing power for police power purposes. As long as Congress keeps to the beaten paths and imposes taxes in the guise of ordinary revenue laws, the courts are not in a position to interfere even though the purpose and effect of the tax is to regulate or destroy the thing taxed; but when it imposes taxes so obviously and peculiarly designed as to leave no doubt that they were intended as penalties or police regulations then the court will declare them unconstitutional. While this is not a very

clear line of demarcation between the valid and the invalid it does set up a restriction upon the use of the federal taxing power for purposes too palpably beyond the range of federal authority.

Mr. Chief Justice Taft delivered the opinion of the court, saying in part:

. . . The law is attacked on the ground that it is a regulation of the employment of child labor in the states,—an exclusively state function under the federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by section 8, article 1, of the federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years; and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienter is associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only

by the taxing officers of the Treasury, the department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required

method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard. . . .

The case before us cannot be distinguished from that of Hammer v. Dagenhart. . . .

In the case at the bar, Congress, in the name of a tax which, on the face of the act, is a penalty, seeks to do the same thing, and the effort must be equally futile.

The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution. This case requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheaton 316, 423, in a much-quoted passage:

"should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." . . .

For the reasons given, we must hold the Child Labor Tax Law invalid, and the judgment of the district court is affirmed.

Mr. Justice Clarke dissented.

LOAN ASSOCIATION v. TOPEKA

20 Wallace 655; 22 L. Ed. 455. 1875.

In pursuance of authority granted by a statute of the legislature of the state of Kansas passed in 1872, the city of Topeka issued bonds to the amount of $100,000 as a donation to a bridge manufacturing company to aid and encourage it to establish and operate shops in the city. Some of the bonds were bought by the Citizens' Savings and Loan Association of Cleveland. The city of Topeka refused to pay the interest due on the bonds and set up by way of defense the unconstitutionality of the state statute authorizing their sale. Suit was brought by the loan association in the federal circuit court for Kansas, jurisdiction arising on the ground of diversity of citizenship rather than upon the presence in the case of any federal question. An appeal was taken to the Supreme Court of the United States.

The decision of the court is interesting for two reasons. First, it established the important constitutional principle that taxes may be validly levied only for purposes which are public in character. The court did not set up any general test by which to identify purposes which are public, but certainly the donation to the bridge company involved the use of public money for a private purpose. The second interesting feature of the case is the fact that it is one of the conspicuous instances in which a statute has been held unconstitutional which did not conflict with any specific constitutional clause, merely because it violated the general principles of our constitutional system. The decision rests upon nothing more definite than the proposition that "there are limitations . . . which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." Had the case arisen in such a manner as to present a question of federal

constitutional law instead of a question merely of state law it would have afforded an opportunity to place the doctrine of public purpose in taxation squarely upon the basis of due process of law under the recently adopted Fourteenth Amendment. However, the court's construction of the amendment in the Slaughterhouse Cases makes it appear likely that that opportunity would not have been seized had it been presented. And the interesting fact is that for many years the Supreme Court contented itself with applying the public purpose doctrine upon the mere authority of the case of Loan Association v. Topeka without attempting to ground the theory upon any more substantial basis. In recent cases, notably Fallbrook Irrigation District v. Bradley, 164 U. S. 112 (1896), and Green v. Frazier, 253 U. S. 233 (1920), it has been strongly implied by the court, if not openly declared, that taxation for a private purpose amounts to a deprivation of property without due process of law.

There is no reason in the nature of things why the rule of public purpose in taxation should not operate as a restraint upon the national government as well as upon the states; and if a case could be properly brought before the court raising that question it seems probable that it might so decide. Certain procedural difficulties, however, seem to stand in the way. To raise the question of the constitutionality of an act appropriating funds raised by taxation one must be a taxpayer and able to prove that he has a definite pecuniary interest arising out of the fact that he has contributed his share to the public treasury. In cases involving the expenditure of public money by cities, counties, or states the taxpayer is frequently able to meet these requirements and secure relief. But when an attempt was recently made by a woman in Massachusetts to enjoin the Secretary of the Treasury from carrying out the provisions of the Maternity Act of November 23, 1921, appropriating money for the purpose of cooperating with the states in the reduction of maternal and infant mortality and the protection of the health of mothers and infants, the court held that the interest of the individual in question in the moneys which were in the United States treasury was "shared with millions of others" and was "comparatively minute and indeterminable" and not sufficient to afford a basis for seeking relief by injunction. Frothingham v. Mellon, 262 U. S. 447 (1923). It would seem in the light of this decision that while the doctrine of public purpose in taxation is not held inapplicable to the federal government there is no direct way of making it effective as a limitation by judicial process.

Mr. Justice Miller delivered the opinion of the court, saying in part:

. . . That proposition [urged against the validity of the bond issue] is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take

the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy. . . .

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that state to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. [Here follows a discussion of the validity of public grants in aid of railroads—a matter on which there was much conflict of authority.]

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it

was beyond the legislative power, and was an unauthorized invasion of private right.

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to

all classes of the people. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." . . .

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. . . .

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. . . .

Mr. Justice Clifford delivered a dissenting opinion.

GREEN v. FRAZIER

253 U. S. 233; 64 L. Ed. 878; 40 Sup. Ct. 499. 1920.

While the case of Loan Association v. Topeka (page 261) established the important doctrine that taxes may be levied only for public pur-

poses, it attempted no general classification which would indicate which purposes were public and which were private. From the large number of cases involving this question which have come before the courts, however, certain conclusions may be drawn. Money used for donations to private individuals or for non-charitable individual relief is clearly used for a private purpose. This was held in the case of Lowell v. Boston, 111 Massachusetts 454 (1873), where the state had appropriated money to be loaned to those who had lost their property in the great Boston fire. Where such payments to individuals rest, however, upon the theory that they are made in satisfaction of a moral obligation owed by the state to the recipient, the courts have held them to be for a public purpose. This is one of the main grounds upon which soldiers' bonus legislation has been sustained, although the courts have not been in full agreement upon this point. All of the ordinary expenses of government, buildings, roads, schools, the administration of justice, the protection of public health and safety, etc., are of course public purposes for which the state may and must spend its money. There are other enterprises which are held public in character but which are sometimes allowed to be carried on by private management which the state may properly support in whole or in part by taxation, or may directly operate. Here would be placed the ordinary public utilities such as railroads, street railways, telephone and telegraph, and the furnishing of water, gas, and electricity.

With the gradual increase in the number of businesses which the city or state has undertaken to own and operate itself, the question is raised with respect to each new project of this sort whether it does not involve the use of public money for a non-public purpose. Some of these are border-line enterprises regarding the public character of which the courts are by no means agreed, such as municipal theaters, municipal and state housing, state banks, and the sale of seed-grain to farmers. If there be a general test by which to judge the public character of these enterprises it may perhaps be stated in the words of a recent authority as depending upon whether "the undertaking, which it is desired to carry on or aid by taxation, will supply a need which may not be adequately supplied by private enterprise alone" (Burdick: The Law of the American Constitution, 534).

In Green v. Frazier the test of public purpose in taxation was applied by the Supreme Court of the United States to the legislative program in behalf of the farmers promoted in North Dakota by the Nonpartisan League in 1919. This legislation provided for the establishment of a state bank, the manufacture by the state of farm products and machinery, the operation of mills, elevators, and warehouses, and the establishment of a Home Building Association to provide homes for residents of the state. Some $19,000,000 was to be raised by the sale of bonds to finance

these projects. While this program undoubtedly represented the most vigorous invasion yet made by any state into the field hitherto occupied by private enterprise and included one or two forms of activity which had fallen under the ban of the courts in some of the states, the Supreme Court held that it did not involve the use of money raised by taxation for a private purpose and was constitutional.

Mr. Justice Day delivered the opinion of the court, saying in part:

. . . The only ground of attack involving the validity of the legislation which requires our consideration concerns the alleged deprivation of rights secured to the plaintiffs by the Fourteenth Amendment to the federal Constitution. It is contended that taxation under the laws in question has the effect of depriving plaintiffs of property without due process of law. . . .

There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the federal question herein involved. This legislation was adopted under the broad power of the state to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment this power of the state was unrestrained by any federal authority. That amendment introduced a new limitation upon state power into the federal Constitution. The states were forbidden to deprive persons of life, liberty and property without due process of law. What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise. . . .

The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 155. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed by the late Mr. Justice Peckham speaking for the court. Concluding the discussion of that subject (p. 158) the justice said:

"In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that

the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state instead of the federal government."

Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrative usurpation of power will authorize judicial interference with legislative action.

In the present instance under the authority of the constitution and laws prevailing in North Dakota the people, the legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state. With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances. . . . Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. . . .

With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

We come now to examine the grounds upon which the supreme court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it was justified for the purpose of providing banking facilities, and to enable the state to carry out the purposes of the other acts, of which the Mill and Elevator Association Act is the principal one. It justified the Mill and Elevator Association Act by the peculiar situation in the State of North Dakota, and particularly by the great agricultural industry of the state. It estimated from facts of which it was authorized to take judicial notice, that 90 per cent. of the wealth produced by the state was from agriculture; and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the state were largely dependent; that the state produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the state), amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the State of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from place to place. It was believed and affirmed by the supreme court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and determine is whether this system of legislation is violative of the federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved so far as we have been able to discover has never been presented to this court.

The nearest approach to it is found in Jones v. City of Portland, 245 U. S. 217, in which we held that an act of the State of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessaries to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the state declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the supreme court of Maine justifying the legislation under the conditions prevailing in that state. We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation as was the fact in Citizens' Savings and Loan Association v. Topeka, 20 Wallace 655. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.

Affirmed.

IX. TERRITORIES

COYLE v. SMITH

221 U. S. 559; 55 L. Ed. 853; 31 Sup. Ct. 688. 1911.

The power which Congress possesses to admit new states into the Union is a purely discretionary power. No territory has any right to claim statehood, but must wait until it seems wise to Congress to confer that status. It is not surprising, therefore, that it should be assumed that Congress in the exercise of an unquestioned power to grant or withhold such a privilege might make the enjoyment of the right contingent upon the meeting of such conditions by the incoming state as might seem to the congressional mind desirable. This seems to have been the theory upon which Congress proceeded with reference to the admission of states, and as early as 1802 we find Ohio compelled, as the price of admission into the Union, to enter into an agreement, irrevocable without the consent of Congress, not to tax for a period of five years lands within the state which were sold by the United States government. The imposing of conditions of various kinds upon the incoming states became a settled policy of Congress, and the stipulations agreed to covered a considerable range of topics. They related to the disposition of public lands, many of them being much more detailed than the Ohio provision; to the use of navigable waters; to the protection of the rights of citizens of the United States; to slavery; to civil and religious liberty; to the right to vote. When Utah came into the Union in 1894 it was obliged to make an irrevocable agreement that there should be perfect religious toleration maintained in the state, that the public schools should be kept free from sectarian control, and that polygamous marriages should be forever prohibited. In 1910 Arizona was authorized by a congressional enabling act to draw up a state constitution preparatory to entering the Union. The constitution framed contained provisions for the popular recall of judges. While Congress somewhat reluctantly passed a resolution admitting Arizona into the Union, President Taft, being bitterly opposed to the recall of judges, vetoed the resolution. A new resolution was then passed providing that Arizona be admitted on condition that the objectionable provision be stricken out of the constitution. This was done and Arizona became a member of the Union.

But if Congress can thus impose conditions upon the new states as they assume statehood, the question arises: Are the states equal? Do we actually have states in the Union which do not have the power enjoyed by

other states; as, for instance, to decide how judges shall be removed from office, or what shall constitute a lawful marriage? It is a rather curious fact in view of the length of time during which this policy has been followed by Congress that the question of the binding nature of these restrictions should have been fully dealt with by the Supreme Court for the first time in 1911 in the case of Coyle v. Smith. This case grew out of a restriction imposed by Congress upon Oklahoma in the enabling act passed in 1906 which provided that the new state should locate its capital at Guthrie and that it should irrevocably agree not to move it from that place before the year 1913 nor to appropriate any unnecessary money for public buildings. This agreement was ratified by the voters of the state at the time that the new constitution was adopted; and, thus bound, Oklahoma entered the Union. In 1910 a bill initiated by the people was approved by the voters of Oklahoma providing that the state capital should forthwith be moved to Oklahoma City and appropriating $600,000 for public buildings. This was, of course, in plain violation of the "irrevocable" agreement which the state had made and a proceeding was instituted to test the validity of the law.

In sustaining the right of the state to move its capital at its discretion regardless of its agreement, the Supreme Court enunciated the important doctrine of the political equality of the states. While this does not prevent Congress from continuing to impose upon states which may be admitted in the future any conditions which it sees fit, no matter how humiliating, it does establish the right of such states to ignore such restrictions upon its governmental authority after it is safely in. It is interesting to note that Arizona after her admission into the Union promptly reenacted the provisions relating to the recall of judges which she had been obliged to strike out, and under the doctrine of this case she was clearly within her rights.

A distinction, however, should be noted between those conditions imposed upon incoming states which relate to political or governmental authority and which would therefore place the state upon an unequal footing in the Union, and those conditions in the nature of business agreements or contracts which relate to property. In Stearns v. Minnesota, 179 U. S. 223 (1900), it was held that an agreement in the enabling act of Minnesota whereby the state received from the United States valuable public lands in return for which it agreed not to tax the land still owned in the state by the federal government and not to tax the property of nonresidents at a higher rate than that of residents, could be enforced against a subsequent effort of the state to violate it, since it did not involve any question of equality of status. In Ervien v. United States, 251 U. S. 41 (1919), the court upheld the validity of an injunction issued against the expenditure by the state of New Mexico of money drawn from the sale of public lands granted by Congress to the state upon its admission into the Union, when such expenditure was for a purpose (the advertising

of the resources of the state) other than that specified in the enabling act. This did not involve the political equality of the state and was held to constitute a breach of trust.

Mr. Justice Lurton delivered the opinion of the court, saying in part:

. . . The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional duty of guaranteeing to "every state in this Union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdic-

tion of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states."

The definition of "a state" is found in the powers possessed by the original states which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted "as a new and *entire member* of the United States of America." . . . Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee as the third new state, it being declared to be "one of the United States of America," "on an equal footing with the original states in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original states."

The power is to admit "new states into *this* Union."

"This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican, . . . but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may, by the imposition of conditions in an enabling act, deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new states in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new state at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state constitution, and not that of an act of Congress. . . .

So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new states after admission, there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms in which the acts admitting them to the Union have been framed. [Here follows a discussion of a case involving the con-

struction of the act under which Alabama was admitted to the Union.]

The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. . . .

It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress. . . .

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. If power to impose such a restriction upon the general and undelegated power of a state be conceded as implied from the power to admit a new state, where is the line to be drawn against restrictions imposed upon new states.

. . . If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity, and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new state have complied with the terms of the act, that it shall be the duty of the President to issue his proclamation, and that "thereupon the proposed state of Oklahoma shall be

deemed admitted by Congress into the Union under and by virtue of this act, *on an equal footing with the original states.*" The proclamation has been issued and the Senators and Representatives from the state admitted to their seats in the Congress.

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. . . .

To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

Mr. Justice McKenna and Mr. Justice Holmes dissent.

DORR v. UNITED STATES

195 U. S. 138; 49 L. Ed. 128; 24 Sup. Ct. 808. 1904.

The problem of the status and government of territories antedates the Constitution itself. Questions arising out of the possession of western lands by the states had some influence in the movement toward national union, and the federal government established in 1789 found itself possessed of large tracts of fertile and sparsely settled territory. The Constitution empowered Congress to make needful rules and regulations regarding territories; and it was the question whether that power extended to the exclusion of slavery from the territories that separated the various parties upon the eve of the Civil War. The problem as to the form of government by which territories should be ruled and the character of the constitutional rights which territorial inhabitants should enjoy did not become acute during the early period. Alaska, acquired in 1867, was the first of the non-contiguous territories which the United States came to possess; and it presented few problems by reason of its sparse population made up in the main of Americans.

When, however, we acquired by treaty with Spain in 1898 the islands of Porto Rico and the Philippines, and in the same year annexed the island of Hawaii, the United States found itself exercising sovereign authority over several million inhabitants of an alien race, unaccustomed to Anglo-Saxon laws or institutions, many of them as yet incapable of full self-government. Thus arose for the first time the important question

whether territory annexed to the United States immediately became an integral part of the United States, or could be held merely as a dependency. The constitutional questions involved were among the most difficult which the Supreme Court has ever faced, calling as they did for the application of constitutional principles to conditions entirely unforeseen by the framers of the Constitution. These were dealt with by the Supreme Court in a series of decisions known as the Insular Cases.

The first problem to arise was whether the island of Porto Rico, after its annexation to the United States, was to be regarded as foreign territory to the extent that tariff duties could still be imposed upon goods imported from it into this country. In DeLima v. Bidwell, 182 U. S. 1 (1901), the court held that while Porto Rico did not become an integral part of the federal Union by the mere fact of annexation it did nevertheless cease to be foreign territory, and that the duties in question could not without further congressional action be collected upon goods imported therefrom. Congress thereupon modified the tariff statutes in such a way as to retain certain duties upon goods brought in from Porto Rico and the Philippines. The validity of this legislation came before the court in the case of Downes v. Bidwell, 182 U. S. 244 (1901), the argument against it being grounded upon the clause of the Constitution which requires that "all duties, imposts, and excises shall be uniform throughout the United States." Did Porto Rico become part of the United States within the meaning of this provision? The court held that it did not. It held this by a five-to-four decision in which there was difference of opinion as to reasons even among those judges who agreed with each other as to result. The result seemed to be, however, that territories could be classified into two categories, incorporated and unincorporated; that incorporated territory became an integral part of the country as a result of the action or implied intention of Congress to make it such; that annexed territory remained unincorporated until such congressional intention was made manifest; that Porto Rico was not thus incorporated, so that while it was not foreign territory in an international sense it was still foreign territory in a domestic sense, was merely an appurtenant possession, and not entitled to equality of treatment under the tariff laws unless Congress chose to extend such treatment.

In the meantime a similar important question had been brewing: namely, the measure of civil liberty and constitutional rights which must be extended to the inhabitants of the new insular possessions, a question which was broadcasted by newspapers and political leaders under the spectacular caption, "Does the Constitution Follow the Flag?" This meant concretely: Is Congress in governing these islands bound by the provisions of the federal bill of rights and other similar guarantees of civil liberty just as it would be bound by them were it passing laws applicable to the nation at large? This seemed to present an even more awkward dilemma than had been involved in the tariff cases. If the Constitution does not

limit Congress in governing these unincorporated territories, then the inhabitants thereof have no protection against arbitrary and tyrannical legislation. If, on the other hand, all of the constitutional guarantees must be observed, the problems of governmental administration over the semi-civilized portions of the territories would be practically impossible of solution. This was the problem which the court faced in the case of Hawaii v. Mankichi in the concrete question whether the requirements of indictment by grand jury and trial by jury as guaranteed in the Fifth and Sixth Amendments applied of their own force in the unincorporated territory of Hawaii. Mankichi had been tried for manslaughter upon an indictment not presented by a grand jury and had been convicted by a verdict rendered by nine of the twelve jurors instead of by a unanimous verdict held uniformly to be required in federal courts by the constitutional provision for jury trial. He petitioned for a writ of habeas corpus alleging the violation of his rights under the federal Constitution. The court's answer to the question "Does the Constitution Follow the Flag" was both ingenious and bold. The guarantees of civil liberty in the Constitution are not all of the same force and authority. Some of them embody fundamental or "natural" rights, and these Congress may not transgress in the government of any territory be it incorporated or unincorporated. Others, however, are the statements of rights which are "formal" or procedural or remedial in character, arising out of the peculiar customs of Anglo-Saxon jurisprudence, and these Congress is not obliged to extend to unincorporated territories unless it wishes to do so. In the light of this classification the rights of jury trial and grand jury indictment are "formal" rather than fundamental. Into which categories the other rights guaranteed in the federal Constitution should be placed is a question which remains unanswered until it shall be concretely raised before the court itself. Hawaii v. Mankichi, 190 U. S. 197 (1903).

The case of Dorr v. United States involved substantially the same question as that presented in Hawaii v. Mankichi. It related to the Philippine Islands and the opinion is somewhat more direct and lucid. Dorr was convicted by a court in the city of Manila of the crime of libel. His demand for a jury trial was denied and he claimed that such denial infringed his rights under the Constitution of the United States. The Supreme Court again holds that the right to trial by jury may be withheld by Congress from unincorporated territories.

In Rassmussen v. United States, 197 U. S. 516 (1905), the court held that Alaska was an incorporated territory and that the jury trial provision of the Sixth Amendment applied there of its own force and could not be abrogated by any congressional or territorial enactment.

Mr. Justice Day delivered the opinion of the court, saying in part:

This case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands. . . .

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in Downes v. Bidwell, 182 U. S. 244.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case, the practical question is, must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary

civil government, 32 Stat. 691, there is express provision that section 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article 3, section 2: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the States where such crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

And in article six of the amendments to the Constitution: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It was said in the Mankichi case, 190 U. S. 197, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. . . .

In the same case Mr. Justice Brown, in the course of his opinion, said: "We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being."

As we have had occasion to see in the case of Kepner v. United States, 195 U. S. 100 (1904), the President, in his instructions to the Philippine Commission while impressing the necessity of carrying into the new government the guarantees of the bill of

rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the island had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry and whose judgments were not final until passed in review before the audiencia or supreme court, with right of final review and power to grant a new trial for errors of law in the supreme court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President and sanctioned by act of Congress, act of July 1, 1902, 32 Stat. 691, has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the Kepner case, supra, the accused is given the right of appeal from the judgment of the court of first instance to the Supreme Court, and, in capital cases, the case goes to the latter court without appeal. It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings, which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories? . . .

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the

United States, was obliged to establish that system by affirmative legislation, it would follow that no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, section 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated. . . .

Mr. Justice Peckham wrote a concurring opinion in which Mr. Chief Justice Fuller and Mr. Justice Brewer concurred. Mr. Justice Harlan delivered a dissenting opinion.

BALZAC v. PORTO RICO

258 U. S. 298; 66 L. Ed. 627; 42 Sup. Ct. 343. 1922.

One question which the Insular Cases left unanswered was how a territory actually becomes incorporated. What is the precise nature of the metamorphosis which it undergoes? Obviously Congress could pass an

act declaring a particular territory to be thereby incorporated, but this Congress has never done. In Rassmussen v. United States, 197 U. S. 516 (1905), the court declared the territory of Alaska to be incorporated as the result of a series of congressional acts relating to it beginning as far back as 1868, which in the judgment of the court indicated the intention of Congress to regard it as incorporated. The same process of incorporation would doubtless have been recognized as operating in the case of Oklahoma, Arizona, or New Mexico during the period prior to their admission to statehood. The status of incorporation was recognized only as a result of the intention of Congress with reference thereto. So much was established. Whether such intention could be inferred from the Organic Act of Porto Rico passed by Congress in 1917 was the question presented by the case of Balzac v. Porto Rico.

The organic act in question had conferred United States citizenship upon the inhabitants of the island, had established territorial courts, and had extended to Porto Rico the operation of numerous federal laws. It had, however, not mentioned the matter of incorporation, and it had included a bill of rights containing most of the provisions of the federal bill of rights except those relating to jury trial. After the passage of the act, Balzac, the editor of a Porto Rican newspaper, was convicted of criminal libel in the territorial court without a jury. He appealed to the United States Supreme Court upon the ground that Porto Rico had become an incorporated territory by virtue of the Organic Act of 1917 and that consequently the Sixth Amendment guaranteeing jury trial was made applicable to the island and should have governed the procedure followed in his own trial. This contention the Supreme Court rejected, thus holding that the granting of United States citizenship to the inhabitants of an unincorporated territory does not in and of itself incorporate it. Just what does incorporate such a territory is a question which the court still leaves unanswered, but it indicates that it is a question which must be settled separately in each case after a careful consideration of all the facts which would throw light upon the intention of Congress with regard to the matter.

Mr. Chief Justice Taft delivered the opinion of the court, saying in part:

. . . We have now to inquire whether that part of the Sixth Amendment to the Constitution which requires that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, applies to Porto Rico. Another provision on the subject is in article 3 of the Constitution providing that the trial of all crimes, except in cases of impeachment,

shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed. The Seventh Amendment of the Constitution provides that in suits at common law, when the value in controversy shall exceed $20, the right of trial by jury shall be preserved. It is well settled that these provisions for jury trial in criminal and civil cases apply to the territories of the United States. . . . But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the Union. Hawaii v. Mankichi, 190 U. S. 197. . . . It was further settled in Downes v. Bidwell, 182 U. S. 244, and confirmed by Dorr v. United States, 195 U. S. 138, that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines . . . had no such effect. . . .

The question before us, therefore, is: Has Congress, since the Foraker Act of April 12, 1900, enacted legislation incorporating Porto Rico into the Union? Counsel for the plaintiff in error give, in their brief, an extended list of acts, to which we shall refer later, which they urge as indicating a purpose to make the island a part of the United States, but they chiefly rely on the Organic Act of Porto Rico of March 2, 1917 . . . known as the Jones Act.

The act is entitled, "An Act to Provide a Civil Government for Porto Rico, and for Other Purposes." It does not indicate by its title that it has a purpose to incorporate the island into the Union. It does not contain any clause which declares such purpose or effect. While this is not conclusive, it strongly tends to show that Congress did not have such an intention. Few questions have been the subject of such discussion and dispute in our country as the status of our territory acquired from Spain in 1899. The division between the political parties in respect to it, the diversity of the views of the members of this court in regard to its constitutional aspects, and the constant recurrence of the subject in the houses of Congress, fixed the attention of all on the future relation of this acquired territory to the United States. Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union,

it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference. Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important; or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.

Again, the second section of the act is called a "Bill of Rights," and included therein is substantially every one of the guaranties of the federal Constitution, except those relating to indictment by a grand jury in the case of infamous crimes and the right of trial by jury in civil and criminal cases. If it was intended to incorporate Porto Rico into the Union by this act, which would, ex proprio vigore, make applicable the whole bill of rights of the Constitution to the island, why was it thought necessary to create for it a bill of rights and carefully exclude trial by jury? In the very forefront of the act is this substitute for incorporation and application of the bill of rights of the Constitution. This seems to us a conclusive argument against the contention of counsel for the plaintiff in error.

The section of the Jones Act which counsel press on us is section 5. This in effect declares that all persons who, under the Foraker Act, were made citizens of Porto Rico, and certain other residents, shall become citizens of the United States, unless they prefer not to become such, in which case they are to declare such preference within six months, and thereafter they lose certain political rights under the new government. In the same section the United States district court is given power separately to naturalize individuals of some other classes of residents. . . . Unaffected by the considerations already suggested, perhaps the declaration of section 5 would furnish ground for an inference such as counsel for plaintiff in error contend; but, under the circumstances, we find it entirely consistent with non-incorporation. When Porto Ricans passed from under the government of Spain, they lost the protection of that government as subjects of the king of Spain, a title by which they had been known for centuries. They had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign. In theory

and in law, they had it as citizens of Porto Rico, but it was an anomalous status, or seemed to be so, in view of the fact that those who owed and rendered allegiance to the other great world powers were given the same designation and status as those living in their respective home countries, so far as protection against foreign injustice went. It became a yearning of the Porto Ricans to be American citizens, therefore, and this act gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any state there to enjoy every right of any other citizen of the United States, civil, social, and political. A citizen of the Philippines must be naturalized before he can settle and vote in this country. . . . Not so the Porto Rican under the Organic Act of 1917.

In Porto Rico, however, the Porto Rican cannot insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution in such matters as judicial procedure, and not the status of the people who live in it.

It is true that in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union, in Rassmussen v. United States, 197 U. S. 516. But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury. . . .

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty

of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. . . .

We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.

Counsel for the plaintiff in error also rely on the organization of a United States district court in Porto Rico, on the allowance of review of the Porto Rican supreme court in cases when the Constitution of the United States is involved, on the statutory permission that Porto Rican youth can attend West Point and Annapolis academies, on the authorized sale of United States stamps in the island, on the extension of revenue, navigation, immigration, national banking, bankruptcy, federal employers' liability, safety appliance, extradition, and census laws in one way or another to Porto Rico. With the background of the considerations already stated, none of these, nor all of them put together, furnish ground for the conclusion pressed on us. . . .

On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States, with the consequences which would follow. . . .

The judgments of the supreme court of Porto Rico are affirmed.

Mr. Justice Holmes concurs in the result.